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IMPAIRMENT OF THE RIGHT TO SUBROGATION AS A SURETYSHIP DEFENSE IN MISSISSIPPI

Hector Currie

INVOLUNTARY EQUITABLE POOLING IN MISSISSIPPI

Norman B. Gillis, Jr.

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James Robertshaw

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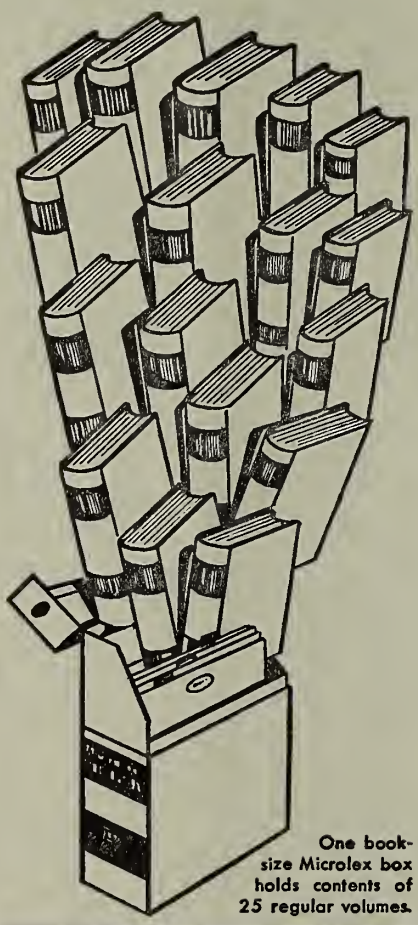

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IMPAIRMENT OF THE RIGHT TO SUBROGATION AS A SURETYSHIP DEFENSE IN MISSISSIPPI

*Hector Currie**

The surety,[1] apart from any right derived from his contract, enjoys certain rights by virtue of his status. Upon payment he acquires a claim to be reimbursed by the principal debtor and, in aid of reimbursement, he will be substituted to the position of the creditor whom he has paid. The latter right, a species of equitable assignment,[2] is called subrogation. Like reimbursement[3] it arises when the surety becomes bound,[4] and it accrues as a cause of action when the creditor has been paid.[5] Unlike reimbursement, which is a legal right based on a promise implied from the principal's request to the surety, subrogation exists even where the surety becomes such without the principal's request or knowledge. It obtains whether the surety's obligation was incurred together with the principal's or later, and whether or not the creditor knew that a surety was involved. It extends to security created after the surety contracted and of the existence of which the surety was not aware.[6]

If the creditor does any act to the surety's damage, it is familiar learning that the surety will be discharged.[7] Impairment of the right to subrogation increases the surety's risk,[8] and it is the purpose of this article

*Professor of Law, University of Mississippi.

[1]"Surety" as here used means any person subject to a duty of performance the ultimate burden of which should rest on another person. It thus includes all who are bound to an accessorial obligation. See RESTATEMENT, SECURITY § 82 (1941); SIMPSON, SURETYSHIP § 4 (1950); 4 WILLISTON, CONTRACTS § 1211 (rev. ed. 1936). For use of the word in a narrower sense see SIMPSON, SURETYSHIP § 5 (1950); MISS. CODE ANN. §§ 253, 254, 256 (1942).

[2]SHELDON, SUBROGATION § 87 (2d ed. 1893).

[3]Washburn v. Blundell, 75 Miss. 266, 22 So. 946 (1898).

[4]Fidelity & Deposit Co. v. Deposit Guaranty Bank, 164 Miss. 286, 144 So. 700 (1932); Canton Exchange Bank v. Yazoo County, 144 Miss. 579, 109 So. 1 (1926).

[5]Magee v. Leggett, 48 Miss. 139 (1873); Lee v. Griffin, 31 Miss. 632 (1856); Bank of England v. Tarleton, 23 Miss. 173 (1851). Subrogation cannot normally be enforced until the creditor has been fully paid. Good v. Golden, 73 Miss. 91, 19 So. 100 (1895).

[6]For a useful discussion of the surety's right of subrogation see SIMPSON, SURETYSHIP § 47 (1950).

[7]An uncompensated surety may be discharged totally, as by release of the principal debtor, RESTATEMENT, SECURITY § 122 (1941); tender of performance by surety or principal, *id.* § 116; extension of time to the principal, *id.* § 129; or modification of the principal's duty, *id.* § 128. He may be discharged only partially, as by release of security, *id.* § 132, or release of a co-surety (as distinguished from a covenant not to sue), *id.* § 135. A compensated surety, however, will generally be relieved only to the extent that he was harmed. 4 WILLISTON, *op. cit. supra* note 1, § 1212A.

[8]*Cf.* Payne v. Commercial Bank, 14 Miss. (6 S. & M.) 24, 38, 39 (1846) (dictum).

to determine when such impairment is available as a suretyship defense in Mississippi. The cases will be considered in four groups: (1) Release of Security, (2) Failure to Take a Set-Off, (3) Misapplication of the Proceeds of Security, and (4) Negligent Loss of Security.

(1) *Release of Security*

Where, by an affirmative act, the creditor cancels or releases security for the principal debtor's performance, a surety for the principal debtor will be relieved *pro tanto;* this is the rule in Mississippi and also the general rule.[9] Thus, where the creditor held a deed of trust on personal property of the principal debtor worth more than the amount of the debt and also a deed of trust on land belonging to the surety, who was the principal's wife, and the creditor cancelled the chattel deed of trust without the surety's knowledge or consent, she and her land were both discharged.[10] A fortiori this was true where the creditor, to obtain the surety's promise, had agreed to transfer to her the security that was later cancelled.[11] If, however, the creditor is powerless to enforce the security, no damage to the surety can result from its cancellation or release. Hence, where a deed of trust was given by the principal to secure payment of two notes until such time only as the signature of the surety, who was out of the state, could be obtained, the creditor did not discharge the surety to any extent by cancelling the deed of trust in accordance with his agreement after the surety had signed.[12]

Any fraudulent dealing by the creditor with the security will relieve the surety to the extent to which he is damaged by the fraud. For instance, where a judgment obtained by the creditor against both principal and surety was a lien on sufficient personal property of the principal to satisfy it, and the creditor took the personalty in satisfaction of another debt of the principal secured by a deed of trust that was a junior lien on the same property, and then removed the property out of the state, the surety was discharged.[13] Similarly, by analogy to release of security, positive acts of mismanagement by the creditor impairing the security will discharge the surety in proportion to the value lost.[14] The same result follows where the creditor bungles enforcement of the security,[15] but these cases must be distinguished from those, to be noticed later, where the creditor simply does not act at all.

A special application of the rule on release of security is found in

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9RESTATEMENT, SECURITY § 132 (1941); SIMPSON, SURETYSHIP § 74 (1950).
10Chism, Churchill & Co. v. Thompson, 73 Miss. 410, 19 So. 210 (1896).
11Chaffe v. Taliaferro, 58 Miss. 544 (1880).
12Pearl v. Cortright, 81 Miss. 300, 33 So. 72 (1902).
13McMullen v. Hinkle, 39 Miss. 142 (1860).
14Barnwell v. Swan, 69 Miss. 907, 13 So. 809 (1892).
15Clopton v. Spratt, 52 Miss. 251 (1876).

construction contracts providing for progress payments and retainage funds. Such provisions are uniformly considered to be for the benefit not only of the owner but also of the contractor's surety, which may assert a claim to the retainage fund by subrogation if it is required to pay on its bond.[16] The right of subrogation comes into existence when the bond is made.[17] Consequently, if the owner anticipates an installment,[18] exceeds an installment,[19] or otherwise improperly pays out retainage funds,[20] the surety is discharged *pro tanto*. A recent case held that where retainage funds were wrongfully released by an architect in relation of contract to the owner but not the surety, the contractual duty was equally owed the surety, who might have an action against the architect for its breach.[21]

(2) *Failure to Take a Set-off*

If the creditor is a bank where the principal debtor has a general deposit, must the bank apply to payment of the note the debtor's credit balance on the due date, or later, at the risk of discharging the debtor's surety *pro tanto* if it does not do so? This was the problem presented in *Moreland v. Peoples Bank*.[22]

In that case the bank brought action against Moreland and Cook, co-makers of a note for $350 payable at the bank to the bank's order. Moreland pleaded, in substance, that he had signed as surety for Cook, as the bank knew; that Cook had on general deposit with the bank the sum of $215.66 on the due date and sums in excess of $350 at various times thereafter; that it was the duty of the bank to pay the note from these funds; and that by reason of its failure to do so Moreland was discharged. The trial court sustained a demurrer to the plea and gave judgment for the plaintiff, and the Supreme Court of Mississippi, sitting in banc, affirmed.

The court recognized that the bank had no sort of lien on the customer's credit balance. "As is well settled, by virtue of these deposits the relation only of debtor and creditor exists. This deposit is not treated as a trust fund or anything of that nature. The bank, by failing to credit the note with any amount due the principal, in no way releases any security which it holds or any valuable right of any kind to which the surety could be subrogated."[23] The bank had, in fact, only a right of

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[16]Jackson Lumber Co. v. Moseley, 193 Miss. 804, 11 So.2d 199 (1942); Canton Exchange Bank v. Yazoo County, 144 Miss. 579, 109 So. 1 (1926).

[17]Cases cited note 16 *supra*; State, for Use of National Surety Corp. v. Malvaney, 72 So.2d 424 (Miss. 1954).

[18]Picard v. Shantz, 70 Miss. 381, 12 So. 544 (1891).

[19]Metropolitan Cas. Ins. Co. v. Koelling, 57 So.2d 562 (Miss. 1952).

[20]Davis Co. v. D'Lo Guaranty Bank, 133 So. 219 (Miss. 1931).

[21]State, for Use of National Surety Corp. v. Malvaney, 72 So.2d 424 (Miss. 1954).

[22]114 Miss. 203, 74 So. 828 (1917).

[23]*Id.* at 212, 74 So. at 830.

set-off which it might or might not exercise. "We therefore conclude that a bank does not owe a surety on a note the duty to apply, or credit, the note with any amount the principal may have on deposit in the bank at, or after the maturity of the note, whether or not this amount be sufficient to satisfy the note."[24]

The actual decision in the *Moreland* case is orthodox. Most courts dealing with the problem have considered that a bank need not exercise its right of set-off where, as in the *Moreland* case, the principal's credit balance on the due date is insufficient to pay the note.[25] Also, it usually is held that the surety is not discharged by a failure of the bank to apply funds deposited after the due date.[26] Williston has suggested that the opposite of these results is preferable if there is a local usage for banks to appropriate such deposits,[27] and the suggestion has found support.[28] Existence of such a usage would be matter of proof for the surety, and in the *Moreland* case the issue was not raised.

The court's statement, however, that the bank "by failing to credit the note with any amount due the principal in no way releases . . . any valuable right of any kind to which the surety could be subrogated" cannot be accepted as correct. Subrogation is not confined to cases where the creditor has a lien. Indeed it is "settled that no such limitation exists."[29] The surety "is entitled to be subrogated to all the rights, remedies, and securities of the creditor, and is allowed to enforce all the creditor's rights and remedies and means of payment against the principal."[30] In short: "When the surety pays the creditor he is entitled to every advantage that the creditor has."[31] Our court long ago declared that the surety when he has paid "has a right, in a court of equity, to stand in the place of the creditor, and to be subrogated to all his rights against the party primarily liable, as to any fund, lien, or equity, that the creditor may have against any other person or property on account of the obligation."[32] Further, there is respectable authority that the surety's right of subrogation extends not only to the creditor's rights against the principal but also to the principal's rights against the creditor.[33] Nor is subrogation inhibited by the fact that the fund or money is the creditor's property by reason of which "the relation only of debtor and credi-

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[24]*Id.* at 215, 74 So. at 831.

[25]SIMPSON, SURETYSHIP § 76 at 385 (1950). On the question of whether a bank need apply to a note not payable at the bank a balance sufficient on the due date, the courts are not in agreement; most deny that such a duty exists. See Annot., 70 A.L.R. 339 at 340-49 (1931).

[26]Farmers' Nat'l Bank v. Jones, 234 Ky. 591, 28 S.W.2d 787, 70 A.L.R. 335 (1930).

[27]4 WILLISTON, *op. cit. supra* note 1, § 1235.

[28]SIMPSON, SURETYSHIP § 76 at 386-89.

[29]SHELDON, SUBROGATION § 87 (2d ed. 1893).

[30]*Ibid.*

[31]SIMPSON, SURETYSHIP § 47 at 215 (1950).

[32]Conway v. Strong, 24 Miss. 665, 666 (1852).

[33]See Notes, 10 MINN. L. REV. 357 (1926), 37 YALE L.J. 391 (1928).

tor exists." The same is true of the retainage fund in the construction contract cases, to which, as we have seen, the right of subrogation has repeatedly been applied.

The court also went too far in stating that the bank would have owed the surety no duty even if the principal's balance on the due date had been sufficient to pay the note. Section 87 of the Negotiable Instruments Law[34] provides that where a negotiable instrument is made payable at a bank it amounts to an order to the bank to pay for the account of the principal debtor. A sufficient credit balance on the due date is equivalent to a tender of payment within the meaning of section 70 of the N.I.L.;[35] and where a valid tender is made, persons secondarily liable on the instrument,[36] and in Mississippi almost certainly sureties on the instrument in any capacity,[37] are discharged.

Since the N.I.L. requires a bank to treat a sufficient credit balance on the due date as a tender of payment of a note made payable at the bank, there seems no reason of convenience why the bank should not also be required to appropriate on the due date a balance that is insufficient to pay the note. No additional burden would be imposed on the bank, since it is already under a necessity to examine the debtor's account on the due date or risk losing the surety's obligation. Any balance is subject to the creditor's right of set-off, which ought in principle to be available to the surety through subrogation.

In an analogous situation our court has held that where the creditor failed to take a set-off the surety was discharged.[38] One Norris rented land from the Green River Lumber Company, his employer, and made a crop which he sold to Scott and Garrett. The Lumber Company, invoking its paramount statutory lien[39] on the agricultural products of the land, sued Scott and Garrett for arrears of rent less than the value of the crop. Appealing from an adverse judgment, the defendants argued that under the statute they were only sureties for the rent and that as sureties they had been discharged when the landlord paid Norris salary in excess of the rent claimed instead of taking a set-off as it might have done. The court, after referring to a case[40] where it had decided that a subtenant was surety for rent under the statute, agreed that the defendants could not be held.

(3) *Misapplication of the Proceeds of Security*

If a creditor holds collateral pledged by a debtor for several claims

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34Miss. Code Ann. § 128 (1942).
35*Id.* § 111.
36*Id.* § 161 (4).
37See Hederman v. Cox, 188 Miss. 1, 193 So. 19 (1940).
38Scott v. Green River Lumber Co., 116 Miss. 524, 77 So. 309 (1918).
39Miss. Code Ann. § 908 (1942).
40Applewhite v. Nelms, 71 Miss. 482, 14 So. 443 (1894).

and one of the claims is secured by the personal liability of a surety, it is generally said that the creditor may apply the entire proceeds of the collateral to the claims not otherwise secured.[41] This is consistent with the usual rule on application of payments to the effect that a payment by a debtor to a creditor owning several claims, one of which is secured by a surety, will be applied: (a) as the debtor directs, or (b) in the absence of direction, as the creditor decides, or (c) if neither manifests an intention, then in the manner most favorable to the creditor.[42]

The usual rule on application of payments is not in force in Mississippi.[43] "The common law appropriates the payment most beneficially for the creditor; the civil law appropriates the payment most beneficially for the debtor . . . . The doctrine of the civil law upon this subject has been adopted in this state."[44] The principal may direct that payment be devoted to the debts without surety[45] or to the debt with a surety,[46] and in the absence of direction the creditor may choose,[47] but if neither manifests an intention the payment will be applied to the debt on which the surety is liable,[48] except that where payment was *in invitum* it will be ratably applied.[49]

Concerning application of the proceeds of security for several claims on one of which a surety is bound, Mississippi also departs from the general rule. In *Solomon v. First Nat'l Bank*,[50] Fewell, who owed the bank as maker of two notes, on one of which Solomon was accommodation indorser, gave the bank a deed of trust to secure both notes. The court held that the Solomon note should be paid first out of the property subject to the deed of trust. Again, where a mortgage was given to secure the payment of notes indorsed for accommodation and also to secure the payment of certain advances that the creditor might make, the accommodation parties were discharged when the creditor with the debtor's assent applied to the subsequent advances the security which was sufficient to pay the notes.[51] In *Christian v. Merchants Nat'l Bank*,[52] a corporation that owned three policies of insurance on the life of its

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41Koblegard v. Maxwell, 127 W. Va. 630, 34 S.E.2d 116 (1945); Morrison v. Citizens Nat'l Bank, 65 N.H. 253, 20 Atl. 300 (1890); Wood v. Callaghan, 61 Mich. 402, 28 N.W. 162 (1886).

42RESTATEMENT, CONTRACTS § 387 (1932); RESTATEMENT, SECURITY § 142 (1941).

43Windsor v. Kennedy & Co., 52 Miss. 164 (1876); Neal v. Allison, 50 Miss. 175 (1874); Hamer v. Kirkwood, 25 Miss. 95 (1852); Poindexter v. La Roche, 15 Miss. (7 S. & M.) 699 (1846).

44McLaughlin v. Green, 48 Miss. 175, 205 (1873).

45Carberry v. Howell, 114 Miss. 549, 75 So. 383 (1917).

46Rosenbaum v. Meridian Nat'l Bank, 73 Miss. 267, 18 So. 549 (1895).

47Wooten v. Buchanan, 49 Miss. 386, 389 (1873) (dictum).

48Sunflower County v. Bank, 136 Miss. 191, 101 So. 192 (1924).

49Wooten v. Buchanan, 49 Miss. 386 (1873); Cage v. Iler, 13 Miss. (5 S. & M.) 410 (1845); Parker v. Mercer, 7 Miss. (6 How.) 320 (1842).

5072 Miss. 864, 17 So. 383 (1893).

51Washington County Credit Corp. v. Miller, 171 Miss. 268, 157 So. 343 (1934).

52188 Miss. 586, 195 So. 485 (1940).

president assigned them as security for several debts owed a bank, and the president of the corporation later assigned as security for one of the notes, on which he was accommodation maker, two other policies that named his wife as beneficiary. The court held that the proceeds of the three policies must be applied first to the president's note.

The Mississippi rule on application of the proceeds of security is strikingly illustrated in *McLean v. Love*.[53] There, collateral had been pledged for four notes, and guarantors had undertaken in two separate contracts to pay any balance of two of the notes that might remain after the collateral had been applied to those two notes. The principal became bankrupt, and the creditor demanded payment of the guarantors in circumstances that gave notice of the creditor's intention to apply the collateral first to the notes not guaranteed. The guarantors paid, nonetheless, and later, when the collateral was sold, two of them sued to recover part of the proceeds. It was held that the guarantors' payment was voluntary, and recovery was denied.

Probably most courts would consider that the guarantors had promised to pay a deficiency and that as the amount of the deficiency was not ascertained their liability never accrued. But *McLean v. Love* was apparently decided on broader grounds. "And to state the case here before us, when a party has been called on to pay a debt in full when he knows that there are credits, or collateral to be credited, which would reduce the amount of the debt or payment to be made, and without having the credits or collateral first applied, and doing nothing to resist the demand by invoking his lawful remedy or defense, he makes the full payment, knowing or having notice that the other party does not intend to repay, he has placed himself voluntarily in a predicament from which he has no right to call upon a court to disentangle him, since, by standing upon his rights, he could have relieved himself."[54] If the guarantors had promised payment of the two notes in any event, they would have been entitled under the Mississippi rule to application of the collateral first to those two notes; and in the circumstances of the record, payment would still have been voluntary.

(4) *Negligent Loss of Security*

Impairment of security through nonfeasance as distinguished from misfeasance by the creditor is not usually available to the surety as a defense.[55] "The creditor discharges his duty when he takes care that no affirmative act of his shall either diminish the value of the security, or tie up his own hands against the principal debtor, or release any claim

53 172 Miss. 168, 157 So. 361 (1934).
54 *Id.* at 182, 183.
55 4 WILLISTON, *op. cit. supra* note 1, § 1233 at 3533.

he holds against the property of the latter."[56] Hence the surety is not discharged if the creditor neglects to enforce collateral until most of its value is lost;[57] or delays in issuing execution on a judgment[58] or a forthcoming bond[59] until the debtor or obligor is judgment-proof; or fails to present a claim against the estate of a deceased principal with the result that the claim becomes barred against the estate[60] at least where the surety did not demand that the creditor present the claim;[61] or fails to prove his claim against the principal's bankrupt estate.[62] The surety is discharged, however, if the creditor delays in collection of a collateral note until it becomes barred by limitations.[63]

An exception is often made to the general rule where the creditor can preserve the value of the security by doing some slight and relatively untroublesome act.[64] Thus, failure to have a mortgage recorded, or to present negotiable paper, or to give notice of an assignment have generally been held to relieve the surety *pro tanto*.[65] But no such exception is admitted in Mississippi.[66]

Bank of Hickory Flat v. Crawford[67] decided that a surety is not relieved where security is lost by the creditor's failure to file a deed of trust for record. The case has been criticized as "unsound in failing to distinguish between delay in the enforcement of the debt when due, and inaction which, resulting in the loss of the security, should release the surety *pro tanto*."[68] In the circumstances, "the security is usually within the sole control of the creditor and not readily available to the surety, the importance of recording well known, and the labor trifling,"[69] and most of the cases hold that taking security will raise a duty to perfect it.[70]

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[56]Clopton v. Spratt, 52 Miss. 251, 260 (1876).

[57]North Am. Life Ins. Co. v. Smith, 178 Miss. 238, 172 So. 135 (1937); Clopton v. Spratt, *supra* note 56.

[58]Caruthers v. Dean, 19 Miss. (11 S. & M.) 178 (1848).

[59]Melton v. Howard, 8 Miss. (7 How.) 103 (1843); Newell v. Hamer, 5 Miss. (4 How.) 684 (1840).

[60]Cohea v. Commissioners, 15 Miss. (7 S. & M.) 437 (1846); Johnson v. Planters Bank, 12 Miss. (4 S. & M.) 165 (1843); Kerr v. Brandon, 3 Miss. (2 How.) 910 (1838).

[61]Johnson v. Success Brick Mach. Co., 104 Miss. 217, 61 So. 178, 62 So. 4 (1913).

[62]Clopton v. Spratt, 52 Miss. 251 (1876). *Cf.* Bankruptcy Act § 16, 30 STAT. 550 (1898), 11 U.S.C. § 34 (1952).

[63]Fennell v. McGowan, 58 Miss. 261 (1880).

[64]RESTATEMENT, SECURITY § 132 (1941); SIMPSON, SURETYSHIP § 75 (1950).

[65]4 WILLISTON, *op. cit. supra* note 1, § 1233 at 3534-35.

[66]Wright v. Watt, 52 Miss. 634 (1876) (judgment not enrolled); McGee v. Metcalf, 20 Miss. (12 S. & M.) 535 (1849) (same); Pickens v. Finney, 20 Miss. (12 S. & M.) 468 (1849) (same).

[67]132 Miss. 350, 96 So. 100 (1923).

[68]Note, 33 YALE L.J. 102, 103 (1923).

[69]Note, 24 COLUM. L. REV. 99 (1924).

[70]Sussex Finance Co. v. Goslee, 82 A.2d 743 (Del. Super. Ct. 1951); Commercial Credit Corp. v. Joseph Greco Motor Co., 16 So.2d 660 (La. App. 1944), *rev'd on other grounds on rehearing*, 18 So.2d 49 (1944); Nebraska State Bank v. May, 117 Neb. 262, 220 N.W. 276 (1928); Mulvihill v. First Nat'l Bank, 80 Colo. 72, 249 Pac. 504 (1926); Bennett v. Taylor, 43 Tex. Civ. App. 30, 93 S.W. 704 (1906); Sullivan v. State, 59

The result of the *Hickory Flat* case would likely be reached in only two or three states.[71]

Conclusion

In Mississippi the courts have, as a rule, dealt generously with the surety. Cases relieving a surety damaged by the creditor's positive act are clearly sound. Even in cases of nonfeasance it is submitted that there are times when the creditor should owe a duty to act. If the creditor's right against the principal was created in part for the surety's protection, the creditor must exercise the right. If the creditor's right against the principal arose in a transaction without reference to the surety, the creditor still should be required to prevent loss to the surety if he can do it without inconvenience. Thus, granting that a right of set-off against the principal may be available to the surety through subrogation, the creditor normally will be free to take the set-off or not as he pleases, since requiring him to enforce the right in all situations would hamper his business. But where the creditor is a bank holding a depositor's negotiable note signed by a surety and made payable at the bank, the N.I.L. requires the creditor to ascertain the debtor's balance on the due date and to apply it if sufficient, and no inconvenience can possibly result if the bank is also required to apply an insufficient balance to the note. Again, where the creditor has security in his control he ought to be held to a duty to perfect it if the necessary acts are not burdensome and if they cannot be done by the surety himself.

Ark. 47, 26 S.W. 194 (1894); Mingus v. Daugherty, 87 Iowa 56, 54 N.W. 66 (1893); State Bank v. Bartle, 114 Mo. 276, 21 S.W. 816 (1893); Galbraith v. Townsend, 1 Tex. Civ. App. 447, 20 S.W. 943 (1892); Atlantic Nat'l Bank v. Douglass, 51 Ga. 205 (1874) (under Georgia statute); Burr v. Boyer, 2 Neb. 265 (*circa* 1870); Toomer v. Dickerson, 37 Ga. 428 (1867) (under Georgia statute); Kemmerer v. Wilson, 31 Pa. 100 (1857); Pickens v. Yarborough's Adm'r, 26 Ala. 417 (1855); *cf.* Colerider v. Central Nat'l Bank, 128 W.Va. 520, 37 S.E.2d 466 (1946); Redlon v. Heath, 59 Kan. 255, 52 Pac. 862 (1898).

[71]See Note, 10 VA. L. REV. 81 (1923); Annot., 37 L.R.A. (N.S.) 699 at 710-11 (1912).

INVOLUNTARY EQUITABLE POOLING IN MISSISSIPPI

*Norman B. Gillis, Jr.**

Introduction

The reservoir rocks which confine oil and gas occupy more often than not large areas underlying several diverse surface ownerships. In the absence of statutory implementation, the correlative rights of each separate landowner in the common mineral reservoir include the taking of oil and gas from the reservoir by non-trespassory operations which constitute neither a nuisance[1] nor negligence,[2] limited by the duty not to injure the reservoir.[3] This right to produce is subject to diminution and ultimately to extinction due to the loss of part or all of the underlying mineral to like operations conducted on other lands overlying the common source of supply, for at common law the only protection against such adverse drainage is found in the exercise of self help by the drilling of offset wells.[4]

The correlative right to drill and produce all the minerals that would flow into a well bottomed beneath one's tract, enjoyed equally by all reservoir owners, came to be recognized as a vested property right, inherent in the ownership of land and in any separate operating estate in the mineral fee. As such, it was, and is, generally afforded the protection of due process clauses in both state and federal constitutions. Consequently, if the legislature has not intervened, each owner of a divided tract is entitled as a matter of law to drill upon his land and produce therefrom; and the common law rule of entitlement to capture without liability for drainage is applied with equal vigor in all jurisdictions, regardless of the particular theory adopted by the courts therein to explain the nature of the landowner's interest in the mineral deposit.[5]

In the early life of the industry it everywhere became economically imperative to drill and produce at as rapid a pace as possible, and in

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*Attorney at Law, McComb, Mississippi. Member, Mississippi and Texas Bar Associations.

[1]Board of Supervisors v. Mississippi Lumber Co., 80 Miss. 535, 31 So. 905 (1902). This case states the surface nuisance rule on facts dealing with water well operations.

[2]Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948); Comanche Duke Oil Co. v. Texas Pac. Coal & Oil Co., 298 S.W. 554 (Tex. Comm. App. 1927).

[3]Richmond Natural Gas Co. v. Enterprise Natural Gas Co., 31 Ind. App. 222, 66 N.E. 782 (1903); Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 57 N. E. 912 (1900); Townsend v. State, 147 Ind. 624, 47 N.E. 19 (1897); Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, 109 S.W. 328 (1908); Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368, 70 L.R.A. 558 (1903); Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919); Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714 (1893).

[4]Barnard v. Monogahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801 (1907).

[5]Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935, *rehearing denied*, 87 S.W.2d 1069 (1935); Walker, *Property Rights in Oil and Gas*, 16 TEX. L. REV. 370, 374 (1938); Hardwicke, *The Rule of Capture*, 13 TEX. L. REV. 391, 403 (1935).

such density as one could afford, to prevent the loss of oil and gas to neighboring operations. In the 130,000 acre East Texas Field, for example, approximate well density increased to an average of one well to every five acres.[6] In other areas operators viewed with alarm the fact that programs of uncontrolled extraction, at full choke, and with a large number of wells bottomed in the mineral bearing zone, rarely resulted in a recovery of more than thirty per cent of the oil in place.[7] In addition, an inestimable amount of those resources actually brought to the surface suffered loss through leakage, evaporation, fire, or from simply having been vented into the air.[8]

Thus, the judicial doctrines of capture and offset, evolved by jurists at the turn of the century as the best available solution to the drainage liability question, were as early as 1925 serving as the principal contributing factor in field conditions which were unquestionably contrary not only to the interests of conservation but to the economy of the oil industry as well. Nonetheless, the courts made it clear that providing any effective remedy to situations involving waste or the abuse of correlative rights was not a function of the judiciary.[9]

The legislative response gradually made itself felt, and has, over the years, assumed a variety of forms, each designed to meet problems peculiar to the field of oil and gas law. These forms include, *inter alia,* prorationing, compulsory pooling, compulsory unitization, well spacing, and regulatory measures governing operating and transporting techniques.

Some of the difficulties involved in the drafting and administration of mineral statutes are illustrated in the frustrating experiences of states which pioneered in the conservation of these natural resources. Legal histories of Texas and Oklahoma, for instance, record a striking commentary on the fact that rights, once vested, and accepted as rules of property, are slow to yield to legislative restraints on their exercise.[10] As

[6]Address by E. O. Thompson, Interstate Oil Compact Commission Meeting, December 12, 1950.

[7]FANNING, OUR NATURAL RESOURCES 129 (1950); "Petroleum Efficiency and Well Spacing," Report of Committees on Reservoir Development and Operation, Standard Oil Co. of New Jersey and Humble Oil & Refining Co., 1943, p. 14; Reply to Staff Report to the Federal Trade Commission on the International Petroleum Cartel, Interstate Oil Compact Commission, 1950.

[8]Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714 (1893). See Hardwicke, *Market Demand as a Factor in the Conservation of Oil and Gas,* Southwestern Legal Foundation (First Annual Institute, 1950).

[9]Barnard v. Monogahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801 (1907).

[10]The legal histories of the oil and gas producing states during this initial period, and down to 1938, are found in AMERICAN BAR ASSOCIATION, SECTION OF MINERAL LAW, LEGAL HISTORY OF CONSERVATION OF OIL AND GAS, A SYMPOSIUM (1938). German's treatment of Oklahoma's experience and the notable works of Hardwicke and Cheek concerning Texas oil and gas illustrate the difficulty the legislatures and conservation agencies in those states encountered in attempting to enact enforceable laws and orders to counter the evils of waste and the inequities sanctioned by common law rules.

well might have been expected, then, the first of the statutory restraints were, at best, piecemeal attempts at regulation, awaiting for their fuller development a further evolution of legal principles governing oil and gas rights and duties, as well as a more enlightened public opinion.

The following paragraphs will describe some of the problems which have arisen because the courts of Mississippi have recently been faced with the unfortunate task of deciding between litigants whose common law correlative rights were only partially and inadequately adjusted by the first mineral conservation statute enacted in this state. Although that first statute has now been repealed and superseded, the doctrines announced by the court in its administration have left a host of problems relating to the pooling or integration of royalty and mineral interests which must be considered even now in the preparation of contracts designed to be operative under the statute presently in force.

Legislative Background

Mississippi's first mineral conservation statute was enacted in 1932.[11] This act created the State Oil and Gas Board, and charged that body with the duty to conserve the natural resources of the state and to encourage their development. Amendments to the original statute were adopted in 1934[12] and 1936,[13] and the original statute, as modified by those amendments, will hereinafter be referred to as the 1932 statute.

It is of first importance to note that neither the 1932 statute nor its subsequent amending measures prior to 1948 provided for or authorized compulsory pooling. The extent of the legislative grant was a delegation of authority to regulate reasonably the drilling for and production of oil and gas, coupled with a duty to conserve the mineral resources of the state, encourage their development, protect correlative rights, and prevent waste of the reserves. To accomplish these ends the Board was granted the power to promulgate rules which were to include provisions for such "drilling, development, sinking . . . and operation of oil and gas wells as may be necessary to prevent the waste of those products and to protect the common source of supply."[14]

In order to enable the Board reasonably to exercise its duty of adjusting the correlative rights and opportunities of each mineral owner in a common source of supply, the power to prescribe rules for proration of

[11]Miss. Laws 1932, c. 117, §§ 1-48. A discussion of this statute is made by Watkins and Avery, AMERICAN BAR ASSOCIATION, SECTION OF MINERAL LAW, *op. cit. supra* note 11, at 91.

[12]Miss. Laws 1934, c. 154, §§ 1-3, amending Miss. Laws 1932, c. 117, § 10, so as to prescribe fees for permits to drill oil or gas wells.

[13]Miss. Laws 1936, c. 305, §§ 1, 2, amending Miss. Laws 1932, c. 117, § 9, so as to provide for proration of natural gas on the basis of market demand, which is not a factor in computing allowables under the law as it now exists.

[14]Miss. Laws 1932, c. 117, § 5.

production was delegated to the Oil and Gas Board.[15] From these express powers and duties the Mississippi Supreme Court in the *California Co.* case[16] found that the statute, although not expressly so providing, also had the effect of vesting in the Board the power to prescribe rules for the spacing of oil and gas wells. The implied power to establish drilling units was later confirmed.[17]

In 1948 the first compulsory pooling provision became law.[18] Representing generally a substantial improvement over the first statute, the bill enacting the new concept also expressly repealed the 1932 act, but did not have the effect of disturbing drilling units then in existence or of abolishing spacing patterns in force under the old law. In fact none of the acts of the Board which had been done pursuant to earlier legislative authority was affected by the repeal of the statute.[19]

As will be seen later in detail, however, questions involving the scope of the 1932 measure are still of much importance, because it is the applicable legislation in any case arising today involving the legality and effect of any unit now producing but which was drilled and placed in production prior to May 9, 1948, or under the rules then in force. These were valid until November 9, 1948,[20] unless earlier replaced. In addition, as previously observed, some of the problems under this early statute may have carried over into the law as it now stands.

Limited Compulsion Appears

Section 10 (a) of the 1948 act[21] provided that when two or more separately owned tracts of land were embraced in an established drilling unit, owners of operating and royalty rights could validly agree to integrate their interests and operate the land as a single drilling unit. Where the parties failed to agree, however, the statute empowered the Board to require a compulsory integration of such interests, but only after notice and hearing. In no event could any unit which was formed through compulsion exceed forty acres in area.[22]

This limitation of the Board's power to compel integration of units

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15*Id.* § 9.

16California Co. v. State Oil & Gas Board, 200 Miss. 824, 27 So.2d 524, *suggestion of error overruled*, 28 So.2d 120 (1946).

17Superior Oil Co. v. Foote, 214 Miss. 87, 59 So.2d 85, *suggestion of error overruled*, 59 So.2d 844 (1952); Green v. Superior Oil Co., 59 So.2d 100 (Miss. 1952). The statute, as now written, expressly delegates these powers and duties to the Board. Miss. Code Ann. §§ 6132-01 to -36 (1942).

18Miss. Laws 1948, c. 256, § 10 (a). See Brunini's outline of the 1948 law, American Bar Association, Section of Mineral Law, Conservation of Oil And Gas, A Legal History (1948).

19Superior Oil Co. v. Beery, 216 Miss. 664, 64 So.2d 357 (1953).

20Miss. Code Ann. § 6132-35 (1942).

21Miss. Laws 1948, c. 256, § 10 (a).

22*Ibid.*

exceeding forty surface acres was eliminated by the legislature in 1950,[23] probably due to the fact that the forty-acre limitation on the Board's power to integrate had the practical effect of restricting the pooling power to oil fields only, where, under the rules, a forty-acre spacing pattern is the common standard; but for gas fields, where the normal spacing pattern in this state is 320 acres, the compulsory provision was of little value. In any event, the present Board knows no acreage limitation on its pooling powers, and is authorized to merge all mineral, royalty and leasehold interests enclosed within an established drilling unit, regardless of size. The statute does not authorize compulsory unitization for large-scale secondary recovery operations covering an entire field or reservoir,[24] although the Board may approve and supervise these joint operations when voluntarily undertaken.[25]

Classes of Pooling Arrangements

What we have said, in summary, is that Mississippi did not enact a compulsory pooling statute until 1948, although it had adopted a conservation law in 1932, and that it was not until 1950 that the legislature saw fit to authorize forced pooling by the Oil and Gas Board of mineral interests into a unit exceeding forty acres in area. But this is not to say that involuntary integration of mineral interests did not occur in Mississippi *prior* to 1948. A by-product of the inadequacy of the 1932 statute, the doctrine of "equitable pooling" arose in situations to which the pre-1948 law exclusively applied, although it will be noted that the cases involving the pre-1948 units were actually decided after 1950.

Formulated by the court to bridge a void created by the early statute, which delegated authority to promulgate spacing rules without providing for accommodating the rights of owners in tracts smaller than the established spacing pattern, equitable pooling, as used herein, denotes the declaration by the court that many of the consequences of pooling exist under certain conditions without the previous consent of all the parties affected and without a prior order of a conservation agency purporting to accomplish that end.[26]

While we have mentioned briefly, in introduction, the concept of

[23]MISS. CODE ANN. § 6132-22 (a) (1942).

[24]Superior Oil Co. v. Foote, 214 Miss. 87, 59 So.2d 85, *suggestion of error overruled*, 59 So.2d 844 (1952).

[25]Miss. Laws 1948, c. 256, § 10; MISS. CODE ANN. § 6132-22 (1942).

[26]Because the court in the first of these decisions cited a number of the maxims of equity, the term "equitable" pooling is used to describe situations of this type. Griffith v. Gulf Refining Co., 215 Miss. 15, 60 So.2d 518, *suggestion of error overruled*, 61 So.2d 306 (1952). Certain Louisiana decisions laid the predicate for the Mississippi decisions. See Sohio Petroleum Co. v. V.S. & P.R.R., 222 La. 383, 62 So.2d 615 (1952); Sun Oil Co. v. Stout, 46 So.2d 151 (La. App. 1950); Placid Oil Co. v. North Cent. Texas Oil Co., 206 La. 693, 19 So.2d 616 (1944); *cf.* Wood Oil Co. v. Corporation Comm'n, 205 Okla. 537, 239 P.2d 1023 (1950).

forced pooling by the Board under present statutory authorization, as well as the doctrine of involuntary equitable pooling, it should be observed that voluntary integration arrangements are by no means obsolete mechanisms in Mississippi. The statute clearly provides that compulsory integration is to be resorted to only after attempts at voluntary pooling have failed.[27]

It becomes apparent, then, that pooling in Mississippi may be accomplished by any one of three separate procedures:

1. Voluntary undertaking, or

2. Express order of the Oil and Gas Board, after notice and hearing, or

3. Decree of the court, proclaiming the consequences of pooling under the circumstances hereinafter detailed.

General Consequences of Common Law Voluntary Integration

The range and impact of the equitable pooling cases do not become apparent unless the general consequences of mineral and royalty integration at common law are first recalled. It is necessary, then, to examine briefly that class of voluntary pooling arrangements which will provide the best foundation for our discussion.

It will be recalled that non-statutory integration is accomplished by any one of several means:

1. A separate pooling agreement entered into either before or after a lease has been executed;

2. A lessee under a delegation of power from his lessor contained in the lease contract, which authorizes him to integrate the demised and reserved interests with other tracts, but usually on a stated acreage limitation;

3. Negotiation of a joint or community lease where two or more landowners, each owning separate tracts of land, join in a single oil and gas lease describing and granting for stated purposes the entire area owned by them. From this type of lease pooling will result even if no mention of pooling is made in the instrument itself.[28]

Obviously, a voluntary agreement of the first named classification can be as comprehensive in its results and as detailed in its provisions as the parties care to make it. Likewise, while lease pooling clauses may generally bear basic similarities, they assume a variety of forms, as do the

[27]Miss. Code Ann. § 6132-22 (a) (1942).

[28]The community lease cases are collected and very capably discussed in Hoffman, Voluntary Pooling and Unitization 9 (1954).

ultimate agreements made pursuant to their authority. Cases involving these two groups of pooling arrangements usually are centered upon an interpretation of the particular provisions of the individual contract before the court.[29] However, pooling arising as the result of the simple joint or community lease is a legal result unfettered and unclouded by extraneous contract provisions inserted by the parties themselves. Thus, the effect which the courts impute to this type of arrangement will serve to form a satisfactory frame of reference from which the effect of other pooling devices can be explored and compared.

What, then, are the results, as between lessors and lessees, of pooling thus accomplished? What results derive as between the several lessors?

With reference to the first question, the Mississippi courts have not had occasion to consider this precise matter, but an authoritative statement, which is not in any manner inconsistent with Mississippi common law precepts, has recently been rendered by the Supreme Court of Texas.[30] The court listed the following consequences to the lessor-lessee relationship as flowing from the act of joint leasing.

> 1. The life of all leases as to each tract described in those leases is extended beyond the primary term for as long as oil, gas, and other minerals are produced from any one of the tracts included in the pooled areas;
>
> 2. The commencement of a well at any point within the unit operates to excuse the payment of delay rentals on all included tracts for the period stated in the lease;
>
> 3. Production from a well on any one of the tracts relieves the obligation to pay delay rentals, during production, on all included tracts;
>
> 4. The lessee is relieved of the implied covenant for reasonable development of each tract separately;
>
> 5. Wells may be located without reference to property lines;
>
> 6. The lessee is relieved of the obligation of drilling offset wells on any other included tracts to prevent drainage by a well on any one or more of such tracts.

Returning to the second question, relating to the consequences as between the several lessors themselves, the primary result is that each lessor and royalty owner will share in production from any well located on any tract within the pooled area in the direct proportion that the

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[29]HOFFMAN, *op. cit. supra* note 28, at 139.

[30]Southland Royalty Co. v. Humble Oil & Refining Co., 151 Tex. 324, 249 S.W.2d 914 (1952).

surface acreage of his ownership within the unit bears to the total combined acreage included in the unit. Other results are:

> "Each [lessor] relinquishes his right to have his own tract separately developed, his right to receive all of the royalties from production from wells on his own tract, and his right to have wells drilled on his tract offsetting other wells on the leased premises. . . ."[31]

In addition, it is held that the community lease, no less than all other pooling arrangements, will, in the absence of language to the contrary, effect a cross conveyance of royalty interests so that all the royalty owners actually become joint tenants in the entire tract.[32] While the Texas and California courts have given the greatest impetus to this doctrine,[33] the cross conveyance theory has also been applied, though only by implication, to lands located in Mississippi.[34]

This theory of cross conveyancing can best be understood by illustration. Assume that A, B, C, and D each leases his separate ten-acre tract to a single lessee, the Rex Company. Either by joint lease or through an act of separate agreement the lands are integrated to form one drilling unit, forty acres in area. Under the cross conveyance doctrine, A has received a one-fourth royalty interest in the tracts of B, C, and D, for the life of the agreement, and he retains one-fourth of the royalty interest in his own tract.[35] Rex drills on B's tract, and brings in a producing well. All of the parties share in the production from B's tract in the proportion their own acreage bears to the total acreage, which also now coincides with the respective royalty interests the parties are said to have acquired by their cross conveyancing. So far there is no difficulty with the theory. But assume that A, by deed describing his tract alone, conveys to M without mention of the pooling arrangement or the lease to which the tract is subject. Has M received the royalty interests held by A in the tracts of B, C, and D?

California holds that a separate deed will be required to divest A

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[31] *Id.* at 329, 249 S.W.2d at 916.

[32] See Veal v. Thomason, 138 Tex. 341, 159 S.W.2d 472 (1942); also Belt v. Texas Co., 175 S.W.2d 622 (Tex. Civ. App. 1943).

[33] For a discussion, see HOFFMAN, *op. cit. supra* note 28, at 144.

[34] Hudson v. Newell, 172 F.2d 848 (5th Cir. 1949).

[35] For accounting and tax purposes, A may be considered to have exchanged his entire mineral or royalty interest for a single, undivided interest in the unit. See Hill, *Tax Consequences Arising Out of Unitization Agreements,* Southwestern Legal Foundation (Third Annual Institute, 1952), at 427.

of the rights obtained under the pooling agreement,[36] but the Supreme Court of Mississippi, fortunately, has taken another position. In *Merrill Engineering Co. v. Capital Nat'l Bank*,[37] it was held that in the absence of a reservation to the contrary, a subsequent grantee of any part of the pooled area would be entitled to the benefits to flow from the pooling arrangement as long as it remained in force and effect against the land, and that this result would follow without regard to whether the pooling agreement made provision for the sharing of the royalties by anyone other than the original parties thereto. While the extent to which the cross conveyance theory applies in Mississippi is not now determinable, it is clear from the *Merrill* case that Mississippi has not been influenced by the implications of the doctrine to the same extent as other jurisdictions. In Mississippi it appears that a grantee of all or a portion of an area previously committed to a pooled area will receive all the benefit his grantor had in that unit, unless the instrument contains language expressing a contrary intention.

This cross conveyance concept, coupled with the very nature of the other consequences of pooling, raises issues having a bearing upon the question of necessary parties to a title suit involving a tract committed to a pooled unit. Generally, the following conclusions can be made:

1. Since each party is held to have an interest in all other lands in the unit, one who seeks to confirm his title to a tract within the unit must make all persons interested in the unit, including royalty owners, parties to his suit.[38]

2. There are some circumstances under which a complainant who claims less than the entire title to a tract, as in a suit to remove a cloud, would not be required to join all persons in the unit.[39]

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[36]Tanner v. Title Ins. & Trust Co., 2 Cal. 2d 814, 129 P.2d 383 (1942). It should be borne in mind that California follows the non-ownership mineral interest theory, as opposed to the mineral fee ownership theory adopted by Mississippi. Note, 13 Miss. L.J. 427 (1941). Different results often flow from the adoption of one or the other theory as controlling in a given jurisdiction. "Treating it as an interest in realty [following the ownership theory] you immediately have these results: The statute of frauds applies; the land registration statutes apply; all of your rules relative to interests in real estate as distinguished from personalty come into play." Lecture by W. D. Masterson, Jr., Professor of Law, Southern Methodist University School of Law, before the North Dakota Bar Association (1952).

[37]192 Miss. 378, 5 So.2d 666 (1942).

[38]Keegan v. Humble Oil & Refining Co., 155 F.2d 971 (5th Cir. 1946); Belt v. Texas Co., 175 S.W.2d 622 (Tex. Civ. App. 1943); Veal v. Thomason, 138 Tex. 341, 159 S.W.2d 472 (1942). A complete discussion of the proposition is made by Cook, *Rights and Remedies Under Unit Operation*, Southwestern Legal Foundation (Third Annual Institute, 1952), at 146.

[39]Humble Oil & Refining Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir. 1951); Texas Conservative Oil Co. v. Jolly, 149 S.W.2d 265 (Tex. Civ. App. 1941); Petroleum Producers Co. v. Reed, 135 Tex. 386, 144 S.W.2d 540 (1940). But *cf.* De Grazier v. Panell Oil Corp., 109 S.W.2d 1109 (Tex. Civ. App. 1937); Cook, *supra* note 38, at 150.

3. In suits to cancel a lease covering lands included in a unit, however, all royalty owners in the unit are necessary parties.[40]

With the foregoing criteria in mind, the nature of the act of pooling, accomplished as an unmodified legal result, can be seen. Obviously, what we have thus far presented is no more than a generalized outline, but even as such it will suffice to form a basis upon which the following discussion can rest.

Equitable Pooling Develops

Attention will next be directed to a series of recent and vastly important decisions growing largely out of litigation in the Gwinville Field in Jefferson Davis County, Mississippi. These decisions are difficult to analyze because they were all decided after 1952, but they involved units formed in the pre-1948 era, to which the peculiar rule of the 1932 statute applied. In addition, some of the units thus formed have been compulsorily pooled under the 1948 or 1950 laws. Nearly all these cases involve two separate opinions, the first being the original judgment, the second relating to arguments made on suggestion of error. We have undertaken to make as simplified a statement of the decisions as is possible, omitting all references to matters not directly within the scope of this paper. Often a number of parties in interest will be referred to by a single proper noun, for the sake of simplicity.

The first of the decisions is *Superior Oil Co. v. Foote*,[41] decided June 9, 1952. Foote was the owner of a mineral interest in a large tract of land in the Gwinville Field. His interest was covered by three separate leases, the primary terms of which were to expire before May 19, 1950, in the absence of production. The lands covered by these leases had been included in two 320-acre drilling units which had been formed under rules in effect prior to the enactment of the 1948 pooling law. The applicable legislation, then, was the 1932 statute, which did not authorize compulsory pooling. Production was had on lands within the units in August and September of 1948, *but not on the tracts described in Foote's lease*. The lease itself contained no pooling provision and Foote's lessee tried unsuccessfully to secure a separate pooling agreement from Foote. Being unable to agree to the terms suggested by Foote as a basis for pooling, the lessee filed a petition before the Board in May of 1950, praying for an order of compulsory integration, and pleading that should such order be refused, the primary terms of the leases would

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[40]Cook, *supra* note 38, at 153. See Shell Oil Co. v. Howth, 138 Tex. 357, 159 S.W.2d 483 (1942). *Cf.* Texas Oil Producing Co. v. Griffith, 218 Miss. 109, 65 So.2d 447 (1953), a suit to remove a prior lease as a cloud on complainant's title. Complainant expressly disavowed any intent to affect the rights of absent parties; such joinder was held unnecessary.

[41]214 Miss. 857, 59 So.2d 85, *suggestion of error overruled*, 59 So.2d 844 (1952).

expire for lack of production. Because of the absence of certain necessary parties the hearing was delayed, and the order of the Board integrating the units was not handed down until September 20, 1950, several months after all three of the primary terms of the Foote leases had expired by their own terms. The order of the Board, however, did not purport to determine the status of the title to the properties committed to the units.

On appeal, the supreme court held that the interests of all persons included in the drilling unit, whatever they were, were unitized as of September 20, 1950, by the order of the State Oil and Gas Board. The question whether the lease terms had been extended was not expressly decided. The court did hold that the drilling units upon which the wells were placed had been lawfully established. It was necessary for the court to decide this point because the existence of an "established drilling unit" is, under the statute, a condition precedent to the validity of an order of compulsory integration by the Board.

Foote, however, was interested in determining whether his lease had been extended by this administrative order, and he immediately brought suit in chancery court asking for a removal of the leases covering his interest, as clouds upon his title, and praying simultaneously for eight-eighths instead of one-eighth of the production attributable to his tract, from and after the date the primary terms of the leases had expired, as alleged, by their own terms.

While this case was being litigated, however, and pending its appeal to the supreme court for final determination of this vital question, several other decisions were handed down which served to form a basis for the ultimate decision in the *Foote* case on the question of lease extension. For the sake of preserving the actual chronological continuity in the development of the case law on this subject we will, for the moment, leave the *Foote* case and focus our attention on the events which next transpired.

Effect of Equitable Pooling Upon Grants of Subdivided Lands Under Lease

On October 6, 1952, the Supreme Court of Mississippi decided the case of *Griffith v. Gulf Refining Co.*[42] Magnolia and Gulf each owned a lease covering an undivided one-half interest in a 250-acre tract. While these leases were still in force, the owner of the surface and reversionary mineral estate conveyed to Griffith and others, without reservation and without mention of the leases, all of the owner's interest in the south ninety acres of the 250-acre tract. The lessees decided to operate

[42]215 Miss. 15, 60 So.2d 518, *suggestion of error overruled*, 61 So.2d 306 (1952).

their undivided interests as a single unit, and applied for and received a permit to drill on the 250-acre tract. The entire 250 acres was approved as a drilling unit. Magnolia and Gulf received an allowable based on the approved unit and drilled a well on the north 160 acres thereof. When the production was sold, the lessees paid only those royalty owners who had interests in the 160-acre tract, relying on the common law rule which states that in the absence of language to the contrary contained in the instrument of conveyance, the grantee of subdivided acreage subject to lease will receive royalties only in the event a well is drilled on his tract.[43] Griffith, however, sued to recover his share of the production, claiming a fraction equal to the proportion his acreage bore to the entire 250-acre unit.

At the trial the facts presented a problem of the nature one might expect to encounter in any situation where common law property rights are restricted by an administrative order under a statute serving some legitimate public purpose, but failing to provide a full and adequate, or fair and reasonable, substitute for private privileges enjoyed prior to its imposition. The courts, in cases such as the *Griffith* case, find themselves in awkward circumstances and are confronted with a choice of alternatives. They may decide to take the legislative shortcomings at their face value by applying the administrative orders under the statute only to the extent they actually reach, together with those common law precepts yet unchanged by the lawmakers, whether or not the result be harsh and inequitable. Thus applied in the *Griffith* case, the common law would have caused Griffith's lease term to be perpetuated by Gulf's production, but would have excluded Griffith from participation therein; while the spacing rule would simultaneously have prevented him from insisting that his lease be fully developed by the lessee. On the other hand, as an alternative position, a court might feel impelled to compensate for the statutory gaps by making equitable adjustments to the positions of the parties affected by the piecemeal legislation.

Faced for the first time with this problem, the Mississippi Supreme Court in the *Griffith* case held that the royalty owners in the ninety-acre tract were entitled to participate in production from a well located at any point within the unit, ruling that the common law principle relied upon by the lessees had been tacitly modified by the enactment of the 1932 conservation statute. Said the court: "When these two parcels of land were merged into one drilling unit, the imaginary line between them was obliterated insofar as the production of gas was concerned. . . . It is unthinkable that the 90 acres can be utilized, as alleged by the complainants in this case, and its royalty owners receive nothing

[43]See Merrill Engineering Co. v. Capital Nat'l Bank, 192 Miss. 378, 5 So.2d 606 (1942); Japhet v. McRae, 276 S.W. 699 (Tex. Comm. App. 1925).

while the owners of the 160 acres receive all of the benefits. . . . 'Equity regards and treats that as done which in good conscience ought to be done.' "[44]

By this decision an equitable modification of the common law was made by treating the drilling unit embracing Griffith's lands as if it had been pooled, at least for the purpose of requiring a sharing of production.[45] If thus limited, the doctrine of equitable pooling involves consequences of which few would complain, having served to eliminate a harsh and undesirable common law principle relating to sharing after subdivision of leased lands in cases where the subdivided areas were included in drilling units formed under the conservation laws.

But the decree in the *Griffith* case had become inextricably bound up in the operation of the 1932 statute so that its application was not easily susceptible to confinement. The court had proclaimed that one result of common law pooling had emanated from a joint operation of an established drilling unit. What of the other consequences? Did equitable pooling accomplish an integration of all interests for other purposes? Would the *Griffith* case be limited only to its facts? The answers to these questions began to unfold when the next step was taken by the court in the case of *Hassie Hunt Trust v. Proctor.*[46]

Automatic Sharing Under All Circumstances

Hassie Hunt claimed to own a valid lease on a forty-acre tract and Proctor claimed ownership of a valid lease on the south ten acres of the same land. Thus, Hunt's title to the north thirty acres was undisputed, and Hunt applied for and received a permit to drill on this tract which was simultaneously included in a unit composed of the entire forty acres. Hunt drilled on the north thirty acres and brought in a producing well. Proctor's permit for a well to be drilled on the south ten acres of that unit was denied, whereupon Proctor sought in chancery

44 215 Miss. at 27, 28, 60 So.2d at 521.

45 In Texas, where spacing is regulated, with no statutory provision for compulsory pooling, if a separate tract exists as such and is under separate ownership at the beginning of oil and gas activity in the vicinity or prior to the application of the spacing rules to the area, that tract, however small, is entitled to at least one well as a matter of right. See 1 OIL & GAS REP. 179 (1952). If a tract is subdivided after the spacing pattern is applied in the area, the single tract as it existed prior to the subdivision will not lose its original entitlement and will be granted at least one well as a matter of right. Railroad Comm'n v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W.2d 967 (1937). In the location of that well upon the formerly unbroken area, the Commission exercises wide discretion, and until recently has denied the owners of the non-well tracts the right to share in production. Railroad Comm'n v. Miller, 165 S.W.2d 504 (Tex. Civ. App. 1942). Sharing between unit owners was allowed in Ryan Consol. Petroleum Corp. v. Pickens, 266 S.W.2d 526 (Tex. Civ. App. 1954). Although colored with an element of estoppel, if enlarged by subsequent cases the decision may ultimately place Texas in accord with Louisiana and Mississippi on the point of sharing within the drilling units.

46 215 Miss. 84, 60 So.2d 551 (1952).

court to have the Hunt lease removed as a cloud upon his title; simultaneously Proctor petitioned the Board for an order of compulsory integration. The Board refused to pass upon the integration order until the results in the chancery hearing on the question of title were determined. It is important to note in this case that the well was placed in production upon a forty-acre unit formed under the 1932 statute, but the petition before the Board for integration was filed shortly *after* the 1948 law came into force.

The chancellor held that Proctor's lease was superior to Hunt's and granted Proctor a decree for one-fourth of the production. Thereupon Hunt appealed. Proctor likewise appealed from the order of the Board, which refused to integrate the tracts pending title determination, and both causes were before the supreme court by consolidation. Laying aside the historical rule of capture as inapplicable to a situation where the conservation statutes apply, the court affirmed the action of the chancellor, found Proctor's lease superior to Hunt's, and held that Proctor was entitled to participate in the production from the well on Hunt's tract.

Unlike the facts of the *Griffith* case, where sharing was allowed to the successor of an original lessor under a lease which was subsequently placed in production, the *Proctor* case involved two strangers in title, and resulted in forced sharing between those strangers simply because their leases had been included in a single drilling unit. Because the court decreed integration at a time when the conservation agency had before it a petition to consider that same question; and because there is usually some reluctance to decide more than is absolutely necessary for the disposition of a particular case, or to invade areas amenable to administrative action, one might ask whether the circumstances of the *Proctor* case were such as to require a decision on the point of who would share in production. With deference, it is submitted that the court might simply have confirmed Proctor's title, leaving the administrative pooling remedy to the Oil and Gas Board. The Board then could have rendered either an order of compulsory integration, pursuant to the notice and hearing requirements of the statute, or granted an exception to the spacing pattern so as to allow Proctor to drill on his own ten acres, with appropriate adjustments to the allowable.

The *Proctor* case, while involving the effect of a unit created under the 1932 statute, was actually decided after that statute had been amended so as to give the Board power to force-pool. And, as observed, a petition for an order of compulsory integration to be based on notice and hearing was pending at the time the decision of the court was announced. In view of this observation, it is difficult to say whether we can safely

assume no such likely result inheres in the 1950 statute so that the mere formation of a drilling unit under the present law will not automatically result in forced pooling between all interests involved therein. Reserving further comment until later, but keeping this matter in mind, we will continue to trace the doctrine's development.

Lease Term Extension Where Lands Lie Wholly Within the Unit

After the *Griffith* and *Proctor* decisions, which announced the equitable pooling concept, and involved cases which for our purposes considered a question of sharing only, bench and bar alike were pondering whether this new pooling device might not affect pooling for all purposes which were accomplished by pooling at common law, and as discussed earlier herein. It will be recalled that in the interim when the *Griffith* and *Proctor* cases were being decided, Foote was prosecuting his cloud suit through the courts for a decision as to whether the order of compulsory pooling entered in his case on September 20, 1950, integrating all interests in Foote's unit, had the effect of extending the primary terms of a lease covering his lands included in the unit, which lease, by its own terms, had expired in May, 1950. The chancellor held that the primary terms of the Foote leases had expired by their own limitations in May, 1950, because of the failure of the lessee to drill upon or produce from the lands described therein. The chancellor further held that the order of compulsory integration of September 20, 1950, could not possibly have any effect upon the terms of Foote's leases, because all of the estate of the lessee had reverted to the lessor, Foote, several months before the pooling order was rendered.

On appeal, however, the supreme court announced that integration had first occurred, *not* on September 20, 1950, but at the time when the leased lands had been included in an established drilling unit.[47] When production from any point in that unit was subsequently had, continued the court, the primary terms of all leases included in the unit were thereby extended. In substance, the order providing for compulsory integration was an unnecessary procedure, because the lands had been automatically integrated long beforehand. Under this holding the royalty and mineral interests became unitized for sharing purposes *and* for the purpose of extending the life of all leases covering lands lying wholly within the unit when the following conditions were conjunctively fulfilled:

> 1. When lessees having drilling and operating rights agreed to jointly operate as a unit tracts which conformed to an established drilling and spacing pattern, *and*

[47]Superior Oil Co. v. Foote, 216 Miss. 728, 63 So.2d 137, *suggestion of error overruled,* 64 So.2d 355 (1953).

2. When the well location was approved and the drilling permit issued by the Board, no formal order establishing the unit being necessary.

Thus the Foote leases, which contained no pooling clauses, were extended by the *unilateral* action of the lessee in performing routine preliminary pre-drilling and well location activities.

A similar set of facts was involved in *Superior Oil Co. v. Beery*.[48] The case was decided in 1953, but the applicable legislation was, as in the *Foote* case, the 1932 statute, since the units involved were formed pursuant to regulations promulgated thereunder.

Beery owned a fifteen-fiftieths mineral interest which was located on lands which had been included in a drilling unit. His tract lay wholly within the unit. He sought cancellation of the lease covering his interest, because at the end of the primary term no production was being had from any of the lands described therein. While production had been secured from other lands in the unit, Beery's lease contained no pooling clause, and he had refused to enter into a voluntary pooling agreement. The court, as in the *Foote* case, held that when the unit was formed by the unilateral action of the operators in securing a permit to drill, a unitization of all royalty interests had thereby been accomplished. Said the court:

> "In other words, we are of the opinion that if the lands in a drilling unit are unitized [by the action of lessees in entering into a joint operating agreement] for the purpose of conserving oil and gas and of preventing waste and the drilling of unnecessary wells . . . all interests are thereby unitized, that they are thereby pooled; and that they are thereby integrated. That is to say . . . to integrate the leases [by lessees alone] as authorized by these two former statutes, and the rules and regulations promulgated by the State Oil and Gas Board pursuant thereto is to integrate the interests of the respective parties involved in the unit."

The court is not moved by the argument that mineral owners in the situation of Beery and Foote are deprived of their property without due process when valuable contract and common law rights are swept away without the benefit of statutory authority, or notice, or hearing. The court reasons that when a unit owner is pooled without notice and contrary to his lease terms by the impact of the 1932 statute on his contract he is not deprived of due process since he is permitted to receive the

48 216 Miss. 664, 63 So.2d 115, *suggestion of error overruled*, 64 So.2d 357 (1953).

equivalent of production from his tract under the unit order.[49] But with deference, it appears that in such a case the mineral owner has been deprived of the difference between one-eighth of his pro rata share of production and eight-eighths of that share, which latter portion he would have received had the lease terms expired in the manner bargained for by the parties.

Originally formulated to cope with the unfortunate plight of a lessor's successor who was being cut off from any enjoyment of his mineral estate, the rule of the *Griffith* case was, in the *Foote* and *Beery* cases, extended to cover and include other circumstances more far-reaching, and situations of fact where the weight of the equities was not so apparent. But, in any event, equitable pooling in Mississippi had thus far been held to accomplish two of the results of voluntary pooling at common law:

1. A pro rata sharing of production; and

2. Term extension of leases committed to the unit, where the leased lands lay wholly within the unit.

Where Part of Leased Land Lies Outside the Unit

It would seem that if equitable pooling results in sharing of production, as in the *Griffith* and *Proctor* cases, and in the perpetuation of leases as to tracts lying wholly within the unit, as in the *Foote* and *Beery* decisions, one might also expect that the term of a lease, part of which is committed to a unit, and part of which lies outside of the unit, would likewise be perpetuated. It is clear that in Mississippi, before equitable pooling arose, this result would follow from voluntary integration, because it is held in this state that the lease is indivisible as to production; that is, production anywhere on the lease or from any point in a pooled area to which a portion of the lease is committed will perpetuate the lease as to all lands therein described.[50]

However, in *Texas Gulf Producing Co. v. Griffith*,[51] decided June 8, 1953, it became clear that equitable pooling would cause some of the results of common law pooling, and not others. In this case the lessor's lands were located partly within and partly outside the drilling unit. The part lying outside the drilling unit was a noncontiguous tract. The

[49]Texas Gulf Producing Co. v. Griffith, 218 Miss. 109, 65 So.2d 447, *suggestion of error overruled*, 65 So.2d 834 (1953).

[50]See the concurring opinion of Judge Ethridge in Texas Gulf Producing Co. v. Griffith, *id.*, made on suggestion of error at 65 So.2d 837. In Louisiana, leases as to lands outside the unit are perpetuated by production from within the unit, and the pooling order may so provide, under statutory authorization. Smith v. Carter Oil Co., 104 F. Supp. 463 (W.D. La. 1952); Le Blanc v. Danciger Oil & Refining Co., 218 La. 463, 49 So.2d 855 (1950); Hunter Co. v. Shell Oil Co., 211 La. 893, 31 So.2d 10 (1947).

[51]218 Miss. 109, 65 So.2d 447, *suggestion of error overruled*, 65 So.2d 834 (1953).

question involved was whether production from a well located on lands within the drilling unit not described in the lessor's lease would extend the term of that lease as to the lands lying *outside* the unit. The court held that although the rule at common law provided for an indivisible term insofar as production was concerned, the rule would be modified in equity in the light of the conservation statute and the public policy of the state. Thus, the term of the lease as to lands within the unit *was* extended by production from a well located on another tract in the same unit, but the term of the lease as to lands located outside the unit was *not* extended by that production. Whether a different result would obtain where the tracts are contiguous, or where the tracts are noncontiguous but the producing well is located on lands described in the lease itself, were matters not decided. The court was careful to state: "We deal with the question only as it arises out of the particular facts of this case."

Applicability to Post-1948 Units

For decision by the court in *Humble Oil & Refining Co. v. Hutchins*,[52] rendered May 18, 1953, was the question whether production from within a unit would fully extend a lease containing no pooling clause which described lands situated partly within and partly outside the unit, where the well was not located on any of these leased lands, but where the leased lands were all contiguous. The facts of that case must be summarized in order to illustrate the peculiar manner in which this issue was presented, and to point out another question of importance to the present discussion.

Hutchins leased to Humble. The lease, according to its terms, was to expire July 1, 1950, in the absence of production "from said land." It contained no pooling clause, and covered 170 acres belonging to Hutchins. Of this acreage, all of which was contiguous, 120 acres were included in Unit 52 and forty-three acres were included in Unit 55 in the Gwinville Field. The seven remaining acres were not embraced in any unit. Units 52 and 55, each consisting of 320 acres, were adjacent to each other, and were formed and approved under Board rules made pursuant to chapter 256, Laws of 1948, which had vested in the Board the forty acre pooling power. Production was obtained from both the units in 1949, but no well was located on the Hutchins lands. On June 23, 1950, after the legislature had removed the forty acre limitation on the Board's pooling power, and prior to the named lease expiration date, the lessee secured an order of forced integration for Unit 55. No such order was obtained for Unit 52. After July of 1950, Hutchins sought removal of the lease as a cloud upon his title. The court held:

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[52]217 Miss. 636, 64 So.2d 733 (1953).

1. The seven acres not included in any unit were free from the lease, and not extended by the production in Units 52 and 55. This conclusion was founded on a lease amendment executed by certain royalty owners, in which Hutchins did not join, which provided that lands outside any area committed to a unit would not be affected by production within the pool.[53] Thus, the court based its findings as to the non-unit lands on a contract provision, and was not required to say what result would follow in the absence of such an agreement.

2. The lease as to the Unit 55 lands, without question, had been extended by the Board pooling order of June 23, 1950.

3. The lease covering those lands in the adjacent Unit 52 was also extended, even though the interests therein had never been unitized by the Oil and Gas Board, or by voluntary agreement of the parties. This extension, however, was attributable not to any facts or consequences of the timely integration of Unit 55, *but followed as an application of the equitable pooling concept.* Quoting the court, pooling in Unit 52 was "the result of the application of the doctrine established by this Court in *Superior Oil Co. v. Beery* and *Superior Oil Co. v. Foote.* . . . These cases control and must be followed."

It cannot be doubted, then, that pooling attaches automatically with the establishment of drilling units under the 1948 act, as it existed prior to amendment, to the same extent as it does in units created under the 1932 statute. But as observed previously, it is impossible to predict reliably those results which will follow in any particular case where the court has not spoken, either as to the applicability of the doctrine itself, or the extent of its effect. No formula can be gleaned from the cases by which one may prejudge a situation for which there is no precedent.

Equitable Pooling as Affecting Units Formed Under the 1950 Statute

Confronting us now is the question of the extent to which these cases are controlling where the drilling units have been established under the rules of the State Oil and Gas Board in effect after the enactment of the 1950 amendment, which expressly authorizes compulsory pooling without limitation as to acreage, and which requires notice and hearing as conditions precedent thereto. Section 6132-22 (a) of the present Code provides, in part, as follows:

"When two or more separately owned tracts of land are embraced within an established drilling unit, the person[s] owning

[53]It is interesting to note that those who executed the lease amendment had an interest in the royalties only, with no power to lease. See 2 OIL & GAS REP. 344 (1953).

> the drilling rights therein and the rights to share in production therefrom may validly agree to integrate their interests and develop their lands as a drilling unit. Where, however, such persons have not agreed to integrate their interests, the board may . . . require such persons to integrate their interests and develop their lands as a drilling unit."

It can be argued convincingly that the *Foote* and *Beery* cases, as well as the other equitable pooling decisions, are not applicable to any units created under these provisions, because the defect in the 1932 statute which the doctrine was formulated to cure has been wholly eliminated by the provision for compulsory pooling found in the 1950 amendment. In addition, the legislature has now clearly indicated that the *establishment of a drilling unit* is not the same thing as the *integration of interests.*

Nevertheless, this distinguishing language was in the 1948 law,[54] and was on the statute books from the time the first of the cited cases was argued and decided. Although inapplicable to the situations then under consideration, there can be no present suggestion that the legislature intended by its wording to effect changes in case law governing the repealed conservation statute, or administrative policy thereunder. Futhermore, an adequate legal administrative remedy was available in both the *Proctor* and *Hutchins* cases, but in neither was the equitable pooling concept held inapplicable. And we have seen that the doctrine is by no means restricted to units created under the administration of the 1932 statute.

Thus, there is no present assurance that pooling, or some of its consequences, does not attach in Mississippi now when those acts which constitute the establishment of a drilling unit are performed by the lessee.

It is proposed that Mississippi lessors who are in doubt as to the present status of the doctrine, and who cannot at the time the lease is taken agree with their lessees on a basis for voluntary unitization, attempt to secure for themselves contract protection against automatic integration. No attempt will be made here to suggest the best means by which this object can be accomplished, but a degree of protection will be afforded if the lessee is required to secure an order of compulsory pooling before he takes all of the steps prerequisite to drilling unit formation.

The cases do not disclose at what precise point in the development procedure the rights of the royalty owners and lessors are enmeshed with those of the other unit participants, but equitable pooling occurs at some step in the chain of events which begins with an agreement by lessees to

[54]See dissent of Judge Lee in the Beery case at 63 So.2d 131.

jointly operate and pool the working interests and ends with the setting of the allowable for the unit well. Our conclusion that the integration in the *Foote* and *Beery* cases occurred when the drilling permit was issued is supported by Rule Four of the Statewide Rules and Regulations of the Board now in effect:

> "The issuance of said permit shall constitute the establishment of the drilling unit as designated in said application and shall likewise constitute the approval of the well location set out in said permit."

It might be questioned, however, since compulsory integration seems inevitable in any event where voluntary attempts have failed, why lessors should concern themselves whether they are force-pooled by action of the Board, or by operation of law where it is found that pooling has resulted from the formation of the unit. The answer is that where the pooling is the result of Board action and order, it is preceded by notice and hearing, at which time the lessor can present his views in the matter. Because of the nature of the common law rights to be altered thereby, orders of pooling must be on terms that are just and reasonable, and must afford each owner a just opportunity to receive his fair and equitable share of the reserves.[55] Indeed, the factors the Board should consider and to which its attention might be directed in determining how production within a drilling unit should be allocated may be different for each individual unit in the field.[56]

The parties may also deem it necessary to define and specify, in agreements voluntarily undertaken, the intended consequences of certain other contingencies which can arise during development after the intervention of the conservation agency, whether or not the court has already adjudicated the result which will follow where such specification has not been made. While a comprehensive list is not intended to be set forth, some suggested provisions are as follows:

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[55]In Humble Oil & Refining Co. v. Welborn, 216 Miss. 180, 62 So.2d 211 (1953), the court construed MISS. CODE ANN. § 6132-21 (d) (1942) to restrict both inter-unit and intra-unit distribution of the allowable to a surface acreage basis only, thereby eliminating any consideration of other factors by the Board such as thickness of sands, regional drainage, or permeability of the strata. If this decision is not overruled or the statute amended, the Board is deprived of the opportunity to make an inter-unit distribution on a fair and reasonable basis as demanded by § 6132-22 (a). Universal application of the surface acreage formula is also inconsistent with the statutory design to uphold and protect correlative rights. An arbitrary method of production is unconstitutional. Henderson v. Terrell, 24 F. Supp. 147 (W.D. Tex. 1938); Amazon Petroleum Corp. v. Railroad Comm'n, 5 F. Supp. 633 (E.D. Tex. 1934); Railroad Comm'n v. Humble Oil & Refining Co., 193 S.W.2d 824 (Tex. Civ. App. 1946); Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961 (1945); Marrs v. Railroad Comm'n, 142 Tex. 294, 177 S.W.2d 941 (1944).

[56]See "Standards of Allocation of Oil Production Within Pools and Among Pools," American Petroleum Institute (1942).

1. Specify whether production outside the leased lands, but within the unit, will perpetuate the lease as to lands outside the unit; and, if not, whether the delay rental clause will be applicable to those outside areas while the included leased lands are held by production.

2. Consider whether any different result will be intended where the outside lands are noncontiguous.

3. Specify whether production *on* the leased lands themselves will perpetuate the lease as to leased lands outside the unit, and whether a different result will follow if the lands outside the unit are noncontiguous.

4. Specify whether lessees, in connection with 1 and 2 above, will be responsible for drainage from under lands located outside the unit, resulting from production on other tracts within the unit to which a portion of the leased lands has been committed.

5. Define the extent to which the lessee's duty to conserve the value of the lease[57] will be affected.

6. Specify if the act of pooling, whether voluntarily done or not, will result in a cross conveyance of royalty interests, or will merely be limited in this respect to a contractual right to share in production.

7. Specify whether the lessee, following a subsequent conveyance by the lessor of a portion of lands included in a pooled tract, may pay the grantee a proportionate share of production, whether or not the well is located on his tract.

8. Indicate whether, on the basis of subsurface geological information available then or after development, sharing among and between unit owners will be in proportion to the recoverable reserves underlying the several tracts, or if it will be distributed by reference to surface acreage only.

If it is subsequently determined that the equitable pooling doctrine does not extend to cover and include drilling units which are now being formed under the 1950 amendments, that decision will be consistent with the legislative design to preserve and protect the correlative rights of Mississippi mineral and royalty owners by replacing their common law privileges with a practical, but fair and reasonable, statutory process.

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[57]In Phillips Petroleum Co. v. Millette, 72 So.2d 176 (Miss. 1954), it was held that an implied covenant "not to impair the value of the lease" existed separately and apart from duty to drill offsets, and that this duty gained equitable recognition when substantial drainage resulted from the affirmative conduct of the lessee himself. "Substantial drainage" is, under this case, less than that which requires a prudent operator to drill an offset well.

MISSISSIPPI'S NEW ADOPTION LAW

*James Robertshaw**

In April of 1953, a decision of the Supreme Court of Mississippi[1] highlighted the inadequacy of our laws dealing with the rights of adoptive parents and adopted children. In an action by adoptive parents to recover for the wrongful death of an adopted child, it held that the plaintiffs had no right to recover under the Wrongful Death Statute,[2] but that on the death of an adopted child, such right, if any existed, vested in the natural parents.

Technically speaking, the court was correct in its interpretation of the existing law. Practically speaking, the result was shocking to the private citizen's sense of justice. In the usual adoption situation, the natural parents, wherever they might be, have had no part in the upbringing of their children, have performed no duty toward the child other than the physical act (often illicit) of bringing the child into the world, and, in most cases, are even unknown to the child.

In a sense, they would have no legitimate cause of action under the Wrongful Death Statute for the reason that they have lost nothing which they did not surrender when the child was adopted.[3] Considering this, weighing it against the loss of companionship to the adoptive parents and the often burdensome medical and hospital expenses in the vain attempt to save the life of an injured adopted child, the result of the court's decision is understandably shocking.

The case, however, came as no surprise to the members of the bar. Our court had long held that an adoptive parent could not inherit from the child,[4] although the adopted child might inherit from its adoptive parents if the decree of adoption so provided.[5]

Thus, this potentially inequitable situation could arise: John and Mary Jones adopt Jack, conferring upon him the right of inheritance. John dies, intestate, leaving his home and his life's accumulation of property equally to Mary and Jack, a minor. Jack, being a minor, cannot convey the property to another, and cannot execute a will. Jack dies before majority. His natural kindred, not Mary, inherit. Thus, Mary finds herself a joint owner, with perfect strangers, of her (she thought) own home and all the property she and John had accumulated through their joint efforts.

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*Attorney at Law, Greenville, Mississippi; Member, State Legislature.
1Boroughs v. Oliver, 217 Miss. 280, 64 So.2d 338 (1953).
2MISS. CODE ANN. § 1453 (1942).
3*Cf.* Cantu v. Southern Pac. Ry., 166 S.W.2d 963 (Tex. Civ. App. 1942).
4Fisher v. Browning, 107 Miss. 729, 66 So. 132 (1914).
5MISS. CODE ANN. § 1269 (1942).

It is a fact that most adoptive parents, in time, think of their adopted children as their own; however, in addition to the limitations set forth above, under the old law an adopted child would not inherit from the natural children of his adoptive parents,[6] nor, presumably, from other adopted brothers or sisters. The adopted children got only the limited right of inheritance from their adoptive parents, but did not inherit otherwise, even within their own family circle.

Other evils existed.

Where the statute made no provision for investigation of the parents, chancellors were often faced with this dilemma. The adoptive parents would come into court in an *ex parte* proceeding, accompanied by their minister, neighbors, and other witnesses, all of whom would attest to the fine character of the proposed parents. Where these parents were not personally known to the chancellor, if he vaguely suspected that something was not quite right, he was forced to the choice of granting the decree sought, or halting the proceeding, of his own motion, and making an investigation of some sort. Such a procedure (for which no legal machinery was provided) could be construed as an implied insult to the petitioners and their solicitor, evidencing the court's distrust of the testimony produced. A chancellor would be understandably reluctant to take such a course.

Much ado has been made in the press, before and since the passage of the new adoption law, concerning a "black market" or a "grey market" in babies. Under the old law, of course, there was no pre-adoption investigation, no waiting period, and no restriction upon the *time* when a "consent" to adoption could be executed. As will be pointed out later, there is some improvement under our new law. However, some comment on this aspect of the problem may now be appropriate.

In the first place, the motivating factor behind adoptions in most cases is one of the strongest natural desires known to man—the desire of a husband and wife for children. Where there are natural barriers, adoption is the alternative. Unfortunately, the demand exceeds the supply. We should be realistic enough to recognize that legislation cannot be expected to channelize all adoptions through several recognized agencies any more than legislation can be expected to stand between a Mississippian and a drink of hard liquor.

In the second place, it does not necessarily follow that all adoptions processed through a recognized agency are good, and all others bad. The term, "black market," as applied to adoptions, has never been satisfactorily defined; however, there can be no inherent evil in the desire of a

[6]Welch v. Funchess, 71 So.2d 783 (Miss. 1954).

couple for an adopted child, and certainly no public policy is violated where natural parents, of their own volition, relinquish their child to another couple who desire to give it the advantages of a home, loving care, education, and nurture.

It is the function of legislation, and the new laws are designed, to protect the interests of the child, the natural parents, the adoptive parents, and the public by providing an orderly procedure under which all facts which are necessary or desirable in reaching a decision are made available to the chancellor, and by providing some freedom of choice to the natural parents.

The problem of defects in our adoption laws has long been a subject of consideration by the Study Committee of the Mississippi State Bar. The legislature, oddly enough,[7] has been reluctant, for one reason or another, to pass corrective measures.

During the 1952 regular legislative session, corrective bills were introduced in both houses.[8] The House bill was favorably reported late in the session, and placed on the calendar.[9] The Senate bill passed that body and was received in the House on April 8, 1952.[10] It also received favorable committee action, and was placed on the noncontroversial calendar. However, when floor action was reached on the bill on April 12, 1952, the point of order was made that the bill was controversial in character. The point was sustained by a vote of more than fourteen members of the House, and the bill, under parliamentary rules in effect in the House of Representatives, was then moved to the foot of the general calendar. There it died when the legislature adjourned on April 17, 1952.[11]

During the succeeding 1954 regular session, corrective bills were again introduced in both houses.[12] Senate Bill 1222 passed that body by a vote of 41 ayes, 4 nays, 2 paired. Instead of being released to the House after passage, however, the bill was recommitted to the Senate Judiciary Committee to be held pending receipt of House Bill 104 (then nearing floor action) so the differences could be worked out in committee.[13] Two days later, House Bill 104 was passed by the House by a vote of 116 ayes, no nays,[14] and released to the Senate.

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[7]When the bills were finally brought on for consideration, after parliamentary delays and death blows, the recorded vote indicated practically no opposition.

[8]S.B. 405, H.B. 766, 1952 Reg. Sess.

[9]H. JOUR. 751 (1952).

[10]H. JOUR. 837 (1952).

[11]*Id.* at 1082.

[12]S.B. 1222, H.B. 104, 1954 Reg. Sess.

[13]S. JOUR. 227, 229, 280 (1954).

[14]H. JOUR. 327 (1954).

However, criticism of Senate action on Senate Bill 1222 from outside the legislature resulted in both bills being held in the Senate committee, without action, until the legislature adjourned.

The action on House Bill 104, however, has a direct bearing on the bill which subsequently became law, and for that reason discussion of the floor action on this bill may be useful in later construction of the act.

Three amendments were offered, of which one failed and two were adopted. The first amendment, which was adopted, added to what is now section 2 of the adoption law the following language:

> "Nothing in this act shall restrict the rights of any person to dispose of property under a last will and testament."[15]

Some concern was felt by members of the House over the possibility that adoptive parents might create vested rights to their property by the adoption proceeding which would later prevent their making a different disposition of their property by will. This amendment makes it clear that the adoption decree could have no such effect.

The second amendment, which was not adopted, proposed to strike from section 2 the following words:

> "Provided that the petitioner or petitioners shall have resided in this state for ninety (90) days unless one of them be related to the child within the third degree according to the civil law in which case such restriction shall not apply."[16]

One of the evils the adoption law sought to control was the practice of nonresidents of the state coming to Mississippi, running through a "quickie" adoption, and departing with the child. Under such circumstances, it would be impossible, of course, to make any sort of pre-adoption investigation, and it would be difficult to determine whether the petitioners would make suitable parents. This amendment, had it been adopted, would have removed one of the controls designed to afford chancellors a reasonable opportunity for a thorough investigation, and a chance to obtain evidence from local witnesses as to the suitability of the petitioners as parents. The refusal of the legislature to adopt this amendment is significant in demonstrating the intent to provide a leisurely, thorough procedure for adoption.

The third amendment, which was adopted, goes directly to the heart of a problem which has vexed the courts in adoption matters for some time. That is, does the adopted child inherit from collateral kindred of the adoptive parents?

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[15]H. Jour. 326 (1954).
[16]*Id.* at 326, 327.

In its original form, the second paragraph of section 6, House Bill 104 read:

> "The final decree shall adjudicate, in addition to such other provisions as may be found by the court to be proper for the protection of the interests of the child, and its effect unless otherwise specifically provided, shall be that (a) the child shall inherit from and through the adopting parents and their other children just as if such child had been born to the adopting parents in lawful wedlock; (b) the child and the adopting parents and adoptive kindred, are vested with all of the rights, powers, duties and obligations respectively, *except as to inheritance,* as if such child had been born to them in lawful wedlock, including all rights existing by virtue of section 1453 of the Code of 1942." (Emphasis added).

The third amendment struck the words, "except as to inheritance," italicized above, and added to the end of the quoted portion, this language:

> "provided, however, that inheritance by or from the adopted child shall be governed by subsection (a) above. . . ."[17]

The proponents of this amendment argued that the adopting parents had no right to make the adopted child the heir of his brothers, sisters, neices, nephews, etc., in a proceeding to which these collateral relatives were not parties, and to which they did not consent.[18] From the debate, their intent was plain. However, there remains the question whether the language of the law, as amended, achieves the desired result.

The amended law provides that the adopted child "shall inherit from *and through* the adopting parents."[19] (Emphasis added). There appears to be a substantial question of what interpretation the courts will give the words, "and through." The only way an adopted child *could* inherit from a collateral relative necessarily would be "through" his parents.

Under the old law, the statute did not, of itself, confer any right of inheritance upon the adopted child; such right, if any, was entirely dependent upon the proposal in the petition, and the chancellor was empowered only to grant or withhold the decree of adoption.[20] In a recent case,[21] the decree of adoption recited that the petitioners "propose that

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[17]*Id.* at 327.

[18]The argument seems absurd to the writer; would the proponents of this amendment argue that collateral relatives should be parties to the proceedings whereby natural children are obtained? Need their prior consent be obtained?

[19]Miss. Laws 1955, c. 34, § 6.

[20]Reeves v. Lowe, 213 Miss. 152, 56 So.2d 475 (1952).

[21]*Ibid.*

the said minor shall be adopted as their own child and shall inherit from either or both of them the same as if she were their own child," and the adoption sought was granted. The question before the court was whether the adopted child inherited from a deceased sister of the adopting parent. The court held:

> "The decree of adoption vested in appellee [the adopted child] the right to 'inherit from either or both' of the adopting parents. It did not undertake or purport to extend that right to a collateral kin of the adopting parents. Certainly we cannot so enlarge upon the right. The same question was involved in the *Hewett* case, supra, where the statute itself vested the right in the adopted child to inherit from the adopting parent. The context in Section 468, Code 1942, governing the descent of land, clearly shows that the word, 'descendants' used in that section means blood descendants."[22]

Applying the reasoning of this case to the new adoption law, if our court should give effect to the words "and through the adopting parents," it should follow it must hold that an adopted child can inherit from the collateral relative; on the other hand, it could be argued with equal logic that the word "descendants" in section 468 still means *blood* descendants.

It is the observation of this writer that the courts have been diligently astute to restrict and narrow the rights of adopted children,[23] to the extent that it would keep an ingenious legislature busy keeping abreast of—to say nothing of ahead of—their decisions.

When Governor White authorized consideration of the matter of adoption at the 1955 special session of the legislature, the proponents of the new adoption law realized that the main resistance would be in the Senate. In order to get the ball rolling, the proponents of the bill adopted the strategy of introducing, verbatim, the bill which had passed the 1954 House unanimously, complete with the amendments adopted by the House.[24]

The bill was carefully considered in the Senate; the consideration

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[22]*Id.* at 164, 56 So.2d at 479. The case referred to is *In re* Hewett's Estate, 153 Fla. 137, 13 So.2d 905 (1943), holding that a statute providing that an adopted child, "for the purpose of inheritance [shall be] regarded as a lineal descendant *of its adopting parents*" does not make the child a lineal descendant of the *ancestors or blood kindred* of the adoptive parents.

[23]*Cf.* Lee v. Foley, 80 So.2d 765 (Miss. 1955).

[24]When the bill was brought before the House in 1955, the question was asked from the floor whether the matter of inheritance from collaterals had been taken care of. The writer answered that question by stating that House Bill 36 contained the third amendment to House Bill 104 of the 1954 session, adopted for the purpose of excluding inheritance from collaterals, but that there was some doubt as to whether the language of the amendment effected its purpose. No clarifying amendment was offered, and the bill passed without amendment.

must have been careful, for twenty-one amendments were proposed, of which twenty were adopted by the Senate. These amendments will not be discussed in detail, but will be considered only insofar as they reflect the basic differences in theory between the original House Bill 36, and what may be referred to as the Senate version.

Four amendments simply clarified the language in the original bill, and were entirely acceptable. Seven amendments we felt strengthened the bill, and, of course, were acceptable. The main features of these amendments were: additional venue was added by including the county where the child was born; the court was permitted to assess costs in its discretion, to discourage frivolous objections by third parties; a savings clause was added, and pending actions protected; a definite effective date, July 1, 1955, was set far enough in advance to permit the bench and bar to familiarize themselves with the provisions of the act, insuring a smooth transition; a definite person was designated who could act for a charitable or religious corporation or organization; and the Senate restored the right of the adopted child to inherit from its natural parents, which the House bill had inadvertently cut off.

The remaining Senate amendments reflected differences in philosophy between the two bodies. The House felt that the investigation should be mandatory; the Senate felt it should be discretionary. The House felt it was enough to provide that the six-month waiting period could be waived in the case of a stepchild, where one of the adoptive parents was related to the child within the third degree, or where the child had already been in the custody of the adoptive parents for that period; the Senate felt that it should also be discretionary with the chancellor where he affirmatively found that the waiting period was not necessary. The House felt that the new birth certificate should show the birthplace of the child as the place of residence of the adopting parents as of the child's birthday, and that the Bureau of Vital Statistics should be required to issue a new birth certificate with this information, regardless of where the child had actually been born; the Senate did not object to the legal fiction that the revised birth certificate show the names of the adoptive parents, but objected to showing a fictitious place of birth, and objected to requiring the Bureau of Vital Statistics to issue a new certificate where the child had been born outside of the state. The House felt that the records of adoption in the chancery clerk's office should be confidential, and that no person should be permitted access without a court order to be issued upon good cause shown; the Senate felt that any attorney should be permitted access to the records.

After the bill was returned to the House, conference was invited between the Senate and House to work out differences. In view of the

stormy career of previous adoption bills, the attitude of the House conferees was that it would be better to yield on theoretical differences, than to stand fast and lose the entire bill which contained the badly needed corrective features covering rights of inheritance, on which both houses had agreed.

Minor differences were worked out, and the House yielded on the proposition as to how much discretion should be vested in the chancellors. The Senate yielded to the extent of permitting the fictitious place of birth to be put upon the revised birth certificates, and the House yielded on the proposition that the Bureau of Vital Statistics should not be required to "falsify" the records of other states. The House yielded on the confidential nature of the records, recognizing the practical necessity of permitting access to attorneys engaged in working out land titles who should not be required to chase over five or six counties to find the chancellor and get a court order.

One additional amendment was adopted by the conference committee which is worthy of mention. The original bill required the natural parents' consent to be executed *subsequent to the filing of the petition,* following the parallel rule of law that a waiver of process executed before the filing of an action is insufficient to support jurisdiction of a court. In including this provision, the authors had overlooked the practicalities of the situation where the child often is released to a recognized adoption agency many months before the parents have been approved for final adoption, and that the consent must be executed by the parent at the time the child is surrendered.

All in all, it is felt that we have a good bill. While there inevitably must be problems to be worked out, the new law is certainly an improvement over the old.

If a "black market" does, in fact, exist, we have attempted to give the unwed mother some freedom of choice, and relieve her of some pressure, by providing that no consent is valid unless it is executed after the child is three days old. This should alleviate the situation where the adoptive parents say to the unfortunate mother, "We'll pay the hospital bills and doctor's bills if you give us the child." She at least has a chance to change her mind, after the child has been born.

The interests of the child are protected by the requirements for investigation and for the six-month waiting period. The requirement of a sworn statement of the property owned by the child will correct one abuse possible under the old law. The records are reasonably confidential, and the revised birth certificate gives some measure of privacy. The provisions for inheritance may or may not let an adopted child's

rights approximate those of a natural child, depending upon the interpretation of the law, but the rights under this law are at least an improvement over the old.

The interests of the adoptive parents are protected by requiring a physical and mental examination; should they be adopting a financial burden or an embarassing problem, instead of a blessing, they at least know about it in advance. The waiting period is as much for their protection as for the child's. Their right to retain their own property within the family circle is protected by permitting them to inherit from the child. Their right to recover for the adopted child's wrongful death, should that unfortunate event occur, is now clear.

Parents who have adopted children under the old law may now readopt their children and receive the benefits of the new law.[25]

The interest of the public in a stable family unit is protected by requiring careful investigation, a reasonable waiting period to make sure the adoption will "take," and an orderly procedure to protect the rights of all concerned.

This law will work about as well as our chancellors make it work in exercising the discretion vested in them. They have before them a grave responsibility to the parties and to the public.

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[25]Much legal discussion has centered around the jurisdiction of our courts to divest the natural parents of their rights of inheritance from children already adopted over objection. Compare the right of our chancery courts to divest husbands or wives of rights of inheritance by divorce actions based upon service by publication, residence of the petitioner, and the inherent right of a state to adjudicate the status of its citizens.

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STUDENT COMMENTS

DELIVERY AND ACCEPTANCE OF DEEDS IN MISSISSIPPI

Introduction

Perhaps there is nothing more disconcerting to an owner of real estate than to find, when he is ready to sell, devise or make improvements thereon, that the deed by which he got possession is invalid because of some deficiency. Equally as perplexing is the situation where the devisee's, heir's, or grantee's title is defeated by some imperfection. These situations arise not infrequently because of some error in the formalities of delivery.

For there to be a transfer by deed, the instrument must be drafted in a form to be effective as a conveyance; it must then be executed in the proper manner; following which there must be a proper and sufficient delivery. It is the universal rule that the ceremony indispensable to the validity of a deed, though all other requirements have been met, is delivery. A delivery is essential to the transfer of title; it gives the instrument force and effect.[1] As a legally operative fact, it is required by statute in Mississippi as a part of the conveyance.[2] An undelivered deed does not divest the grantor of or invest the grantee with title even though the intent to deliver is clear and the failure to deliver is due to accident.[3]

All courts and text writers agree that delivery is essential, but exactly what constitutes the requisites of a valid delivery has led to a great deal of confusion in the decisions of the courts of the various states, of which Mississippi has been no exception. The purpose of this Comment is to develop some of the problems in connection with the delivery of deeds, to establish the position which Mississippi has taken, and to compare the decisions of the Mississippi Supreme Court with those of other states.[4]

Some of the confusion no doubt arises from the fact that delivery connotes in the minds of most people a manual tradition from one person to another. "The expression 'delivery' as applied to written instruments had its beginning . . . in connection with written conveyances of lands, the manual transfer . . . of which was, in early times, upon the continent of Europe, regarded as in effect a symbolical transfer of land itself, analogous to livery of seisin."[5] This requirement of actual, manual tradition became well established in England in connection with certain classes of instruments and, in particular, deeds of grant. But the law became less formal, and delivery of a deed came to be recognized as an expression of intention supplemented by some manifestation of that intention, and manual transfer or lack of it ceased to be conclusive of that intention.[6]

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[1]Johnson v. Brooks, 31 Miss. 17 (1856).

[2]MISS. CODE ANN. §§ 831, 832 (1942).

[3]Weisinger v. Cock, 67 Miss. 511, 7 So. 495 (1890).

[4]For comparable articles, see Rundell, *Delivery and Acceptance of Deeds in Wisconsin*, 1 WIS. L. REV. 65 (1921); Notes, 30 IOWA L. REV. 108 (1944), 4 BAYLOR L. REV. 63 (1951).

[5]4 TIFFANY, REAL PROPERTY § 1033 (3d ed. 1939).

[6]2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 85 (2d ed. 1923); 9 WIGMORE, EVIDENCE §§ 2405, 2406 (3d ed. 1940).

Intention, the Controlling Factor

Since delivery is an essential part of the execution of a deed, it does not take effect until there has been a delivery to the grantee, either actual or constructive.[7] The simplest mode of delivery is the actual handing over of the deed by the grantor to the grantee with the expressed intention of passing title. But a manual delivery is not by any means essential. "Delivery is either actual, *i.e.*, by doing something and saying nothing, or else verbal, *i.e.*, by saying something and doing nothing, or it may be both."[8] However, it is the intention in all cases that gives vitality to the act, whatever it may be, or to the words, whatever they may be. Whether there has been a delivery is a question of fact rather than of law.[9] When the delivery of a deed is placed in issue, the burden of proof rests upon the party asserting delivery.[10]

This intention may be inferred from a variety of circumstances. It may be inferred from the grantor's acts and declarations at the execution of the instrument or from his subsequent acts and declarations. The fact that the grantee enters into possession of the land and makes improvements is a circumstance tending to show the grantor's intention to deliver the deed and complete the sale. There must, however, always be some evidence of an intent to deliver.

Perhaps the best case illustrating the necessity for the intent to convey and its effect upon the legally operative fact of delivery is *Frederic v. Merchants and Marine Bank*.[11] The grantee and his wife purchased a lot from the grantor bank. The deed was placed in the vault until construction was begun on the property. There was conflicting testimony as to whether the deed was ever actually handed to the grantee. When asked to do so by the surveyor employed by the grantee's wife to survey the lot, the president of the bank gave him the book and page where the deed was recorded, but testified that he did not know whether the grantee's wife had recorded the deed. The court held the delivery valid, basing its decision on the facts that the grantee had paid consideration, that the bank upon the execution of the deed had removed the lot from its realty assessment, and that the conduct of the grantee in erecting improvements was evidence of a vesting of title. The court declared that it was apparent both from the words and acts of the grantors that they intended to treat the deed as having been delivered.

It is not essential that delivery be made to the grantee himself. Generally, delivery may be made to the grantee's agent and even to a third person who is not the grantee's agent, provided the grantee assents to the deed and receives it.[12]

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[7]Lynch v. Lynch, 121 Miss. 752, 83 So. 807 (1920); Davis v. Williams, 57 Miss. 843 (1880); Johnson v. Brooks, 31 Miss. 17 (1856).

[8]SHEPPARD, THE TOUCHSTONE OF COMMON ASSURANCES 57 (6th ed. 1791).

[9]Davis v. Williams, 57 Miss. 843 (1880). If the testimony shows an absolute inference of law that there was a delivery, the court may instruct the jury to find a delivery; but when there is conflicting testimony, as is often the case, the finding should be left to the jury under proper instructions upon the whole evidence of the case.

[10]Wilbourn v. Wilbourn, 204 Miss. 206, 37 So.2d 256 (1948).

[11]200 Miss. 755, 28 So.2d 843 (1947).

[12]See, *e.g.*, Slayden v. Johnson, 296 Ky. 598, 178 S.W.2d 36 (1944).

An instrument improperly acquired may be subsequently made operative or ratified by the grantor's recognition of title being in the grantee.[13] Tiffany asserts that what actually occurs is a delivery by the grantor—an expression of an intention by him that the instrument which has already passed into the grantee's hands shall take effect as a transfer of title. An instrument which is inoperative as a conveyance cannot be made operative, because there is nothing to ratify.[14]

A delivery to one of two or more grantees who take the title as tenants in common, in the absence of evidence to the contrary, is a delivery to both or all. However, all the parties must join in a delivery where the deed indicates that it be jointly executed.[15] Moreover, once the deed has been executed and delivered, the delivery cannot be revoked and cannot be defeated by an act occurring afterward, unless it be by some condition contained in the deed itself.[16] A redelivery to the grantor does not revest title even if there has been an intentional cancellation of the instrument. A new deed is required.[17]

Presumptions Relating to Delivery

There are various presumptions relating to the law of delivery. Where a deed is found in the possession of the grantor, a presumption arises that it was never delivered. In the Mississippi case of *Ligon v. Barton,*[18] the court held that there was no delivery where the grantor, without his wife's knowledge, placed a deed in a tin box among his private papers in a wardrobe where it was found after his death. This presumption is only another way of saying that the burden of proving delivery is upon the person alleging it.[19]

Possession of a deed by the grantee is prima facie, but not conclusive, evidence of its delivery, but parol evidence is admissible to show that the deed in fact was not delivered.[20] The rule that parol evidence is not admissible to contradict a deed has no application to cases of this kind. However, it is generally held that a deed in possession of a third party does not raise a presumption of delivery,[21] but there appear to be no Mississippi cases so holding.

There is an inference of delivery from the execution of a deed in the presence of witnesses.[22] No legal presumption exists that a deed is delivered because it is signed and acknowledged.[23] However, *Kane v. Doe*[24] seems to have held that a deed duly executed and acknowledged is prima facie a valid deed in the absence of controlling evidence, for in that case

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[13]See, *e.g.*, French v. Ayres, 201 Okla. 494, 207 P.2d 308 (1949).

[14]4 TIFFANY, REAL PROPERTY § 1035 (3d ed. 1939).

[15]Martin v. Adams, 216 Miss. 270, 62 So.2d 328 (1953).

[16]McAllister v. Mitchener, 68 Miss. 672, 9 So. 829 (1891); Kelly v. Wagner, 61 Miss. 299 (1883); Connor v. Tippett, 57 Miss. 594 (1880); Partee v. Mathews, 53 Miss. 140 (1876); Burton v. Wells, 30 Miss. 688 (1856).

[17]See Note, 9 MISS. L.J. 376, 379 (1937).

[18]88 Miss. 135, 40 So. 555 (1906).

[19]4 TIFFANY, REAL PROPERTY § 1039 (3d ed. 1939).

[20]Morris v. Henderson, 27 Miss. 492 (1859).

[21]See *e.g.*, Chambley v. Rumbaugh, 333 Pa. 319, 5 A.2d 171 (1939). See also Annot., 141 A.L.R. 305 (1942).

[22]Davis v. Williams, 57 Miss. 843 (1880).

[23]*Ibid.*

[24]17 Miss. (9 S. & M.) 387 (1848).

there was no formal delivery of the deed, it being found among the grantor's private papers after his death. It is suggested that this decision is inconsistent with the principles that (1) the grantor must relinquish all control and dominion of the instrument during his lifetime, and (2) there is a presumption of nondelivery if the instrument is retained by the grantor.

The registration of a deed is prima facie evidence of its delivery,[25] but it is not conclusive. This presumption was rebutted in *Metcalfe v. Brandon*[26] by showing the grantee's ignorance of a deed for seven years and prompt repudiation of a trust accompanying the deed when informed of its existence.

The recordation of a deed raises a strong presumption of delivery. Since the requirement of delivery is an act manifesting an intent to place the instrument in operation, it seems that the recordation by the grantor meets this requirement if otherwise unexplained. It is difficult, however, to justify the Mississippi cases on this question.

In *Beauchamp v. McLauchlin*[27] a deed was delivered for record, recorded, and redelivered to the grantor. The grantor placed the deed in a trunk in his home and retained physical possession of it. The grantee, who was an infant, knew of the deed; but the grantor did not actually deliver the deed to the grantee until eight years after the recordation. The question of delivery arose on the right of the grantee to redeem from a sale for delinquent taxes. The court held that the instrument became effective when the grantor placed the deed on record and, therefore, the grantee was permitted to redeem. The *Beauchamp* case cited *Chapman v. Lott*,[28] where the court declared that the delivery of the deed by the grantor for recordation was an actual, overt act, open to the world, evidencing an intention to deliver. A deed had been executed by a husband to his wife, and after recording it, the husband kept the instrument with the family papers in the home. *Young v. Elgin*[29] was also cited by the court in the *Beauchamp* case, but it appears that this decision is of doubtful weight since it is not clear from the report of the case just when the deed was recorded.

The Mississippi Supreme Court apparently reached a result contrary to the decisions just referred to in *Lynch v. Lynch*[30] where a father signed and recorded a deed conveying land to his son, but retained possession of the instrument after recordation. The court reached the conclusion that the presumption arising from recording the instrument yielded to the proof where the instrument remained in the possession of the grantor and there was never in fact a manual tradition to the grantee. The

25Bullitt v. Taylor, 34 Miss. 708 (1858); Ingraham v. Grigg, 21 Miss. (13 S. & M.) 22 (1849).

2660 Miss. 685 (1882).

27200 Miss. 83, 25 So.2d 77 (1946).

28144 Miss. 841, 110 So 793 (1927).

2927 So. 595 (Miss. 1900). Here, a mother executed a deed to her daughter who lived with her and placed the deed in her (the grantor's) wardrobe. The daughter knew nothing of the execution of the deed until the grantor, when leaving a few months afterward to visit another daughter, told the grantee where the deed was and that she had given the property to her. The court held the delivery valid even though the deed was still in the wardrobe when the mother died.

30121 Miss. 752, 83 So. 807 (1920).

Beauchamp case seems to overrule the *Lynch* case by implication. A recent Mississippi decision[31] indicates that where the grantor has reserved an interest in the property, the presumption of nondelivery by the retention of the deed by the grantor after recordation fails.

The presumption arising from recordation apparently means that such action on the part of the grantor shows a prima facie intention on his part that the instrument shall be legally operative. However, it is said that the action of the grantor in having the deed recorded does not show a delivery if the recordation was without the knowledge or consent of the grantee;[32] but this seems to raise another question, one of acceptance. Tiffany states that this cannot be generally regarded as a repudiation of the view because the presumption of recordation is not conclusive.[33]

Delivery in Escrow or Conditional Delivery

A conditional delivery is usually referred to as a delivery in escrow.[34] Originally the word was "escroll," which means a writing, and there was an attempt to distinguish a deed (an instrument which is presently effective) from an "escroll" (an instrument which must await the happening of a contingency before it should possess vitality). Today the word "escrow" is loosely applied to any case where there occurs the intervention of a third party.[35]

Delivery in escrow is defined as a transfer of possession of a deed to a third party with direction that the deed be delivered to a named grantee upon the performance of some designated condition.[36] It is obvious that there must be a *physical* transfer; and although this is the majority rule in the United States,[37] it is "a relic of the primitive formalism which attaches some peculiar efficacy to the physical transfer . . . as involving a symbolical transfer of the property described therein."[38] Since an absolute delivery may be made without manual tradition, it seems as though a conditional delivery could be so made. In England it has been so held.[39]

A delivery of a deed in escrow must be made to a third person and not to the grantee.[40] If the delivery be to the grantee, there is an absolute delivery and the deed takes effect immediately. A delivery by the depositary contrary to the direction of the grantor does not pass title.[41] If the depositary is an agent of the grantee and accepts the deed without authority, it has been held in Mississippi that there is no delivery, even though the grantee takes possession of the deed and claims an uncon-

[31]McMillan v. Gibson, 76 So.2d 239 (Miss. 1954).

[32]Bullitt v. Taylor, 34 Miss. 708 (1858).

[33]4 TIFFANY, REAL PROPERTY § 1044 (3d ed. 1939). See Graham v. Graham, 213 Miss. 449, 57 So.2d 175 (1952), where the court could find no intention on the part of the grantor who had the deed recorded but retained possession.

[34]Gavit, *Conditional Delivery of Deeds*, 30 COLUM. L. REV. 1145 (1930).

[35]Bell, *Conditional Delivery of Deeds*, 9 ORE. L. REV. 153 (1930).

[36]BURBY, REAL PROPERTY § 247 (2d ed. 1954).

[37]See. *e.g.*, Sweeny v. Sweeny, 126 Conn. 391, 11 A.2d 806 (1940).

[38]4 TIFFANY, REAL PROPERTY § 1049 (3d ed. 1939).

[39]Gudgen v. Bessett, 6 Ell. 8 Bl. 986 (1866); Xenos v. Wickham, L.R. 2 H.L. 296 (1867).

[40]Graves v. Tucker, 18 Miss. (10 S. & M.) 9 (1848).

[41]Threatt v. Threatt, 212 Miss. 555, 54 So.2d 907 (1951).

ditional delivery.[42] The escrow holder has been referred to as a trustee or an agent for one party or the other, but Burby would treat the escrow holder as a bailee or a mere custodian.[43] Whatever the status, the grantor must surrender all control over the interest to be conveyed, and it is generally held that a reservation of a right to recall or an attempt to recall is ineffectual.[44]

A question that commonly arises in litigation is the effective date of the conveyance. From the language and holdings of the Mississippi Supreme Court it is difficult to ascertain when title passes. As to the respective rights of the grantor and grantee, it was indicated in the early case of *Whitfield v. Harris*[45] that after a delivery in escrow of a deed to be held until the payment of purchase money, the vendor reserves only an equity of redemption, having disposed of the legal estate, and the vendee acquires an equitable estate. The court stated that title does not generally pass until the performance of the condition and the delivery of the deed to the purchaser, but asserted that a fiction will be created to relate the deed to the first delivery when necessary to prevent an injustice. The court found that justice required that the deed be related back to the first delivery in order to protect the vendee from the judgment creditors of the vendor.

The *Whitfield* case was followed in *Simpson v. McGlathery*,[46] the court adding by way of dictum that the death or disability of the grantor, occurring after the first delivery, would not invalidate the deed. However, the more recent case of *Wood v. Moroth*[47] creates confusion. The court there decreed that "an instrument held in escrow . . . does not take effect until its *final delivery* unless in order to prevent a failure of justice it becomes necessary to make the second delivery relate back to the first." (Emphasis added). It is submitted that "final delivery" and "performance of conditions" as indicated in the *Whitfield*[48] and *Simpson*[49] cases do not mean the same thing. There may be a final delivery though the condition has not been performed, and this will not pass title. In other words, the final delivery and the vesting of title will not necessarily occur at the same time. It seems that the final or second delivery could be inferred from slight circumstances and that necessarily there would not have to be a manual tradition, because if the condition has been performed, the intention of the grantor should be the controlling factor, *i.e.*, the passing of title should occur after the performance of the condition. The *Wood* case seems to say that title passes when the custodian *delivers* the deed to the grantee.

The question may arise as to the necessity of an enforceable contract to convey before a delivery in escrow can be made. It appears that

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42Mississippi State Highway Comm'n v. Anderson, 183 Miss. 458, 184 So. 450 (1938).
43Burby, Real Property § 247 (2d ed. 1954).
44See, *e.g.*, Lechner v. Halling, 35 Wash. 2d 903, 216 P.2d 179 (1950).
4548 Miss. 710 (1873).
4652 Miss. 723 (1876). Upon a refusal of the depositary to deliver the deed, the grantee's remedy is against the depositary and not the grantor.
47128 Miss. 143, 90 So. 714 (1922).
48See note 45 *supra*.
49See note 46 *supra*.

California,[50] Utah,[51] Oregon,[52] Louisiana,[53] Massachusetts,[54] New Jersey,[55] Texas,[56] and Georgia[57] hold that a contract is necessary. It is submitted that Mississippi has not indicated that there be such a requirement. When there has been a delivery, either absolutely or in escrow, the relation of the parties is that of grantor and grantee under a conveyance and not of vendor and vendee under a contract, and therefore the existence of an enforceable contract is unnecessary.[58] The moment a deed is deposited with an escrow holder the process of delivery is begun, and it cannot be thereafter interrupted by the grantor during the fixed time for performance.

Closely related to a delivery in escrow is the situation where the grantor hands the instrument to a third party with a direction that it be given to the grantee upon the grantor's death. The distinction between a delivery such as this and an ordinary conditional delivery is that in the latter case the condition may never be satisfied, while in the former the condition of death must necessarily be satisfied. A deed must take effect upon its execution if at all. If the intention is manifest that the deed should not take effect immediately but should be operative only upon the grantor's death, it will never take effect unless it is executed with such formalities that it may be effective as a testamentary disposition.[59]

For the delivery to be operative, it is generally held that there must be no reservation on the part of the grantor of any control over the instrument.[60] Thus in *Beasley v. Beasley*[61] the court held a delivery valid where the grantor executed a deed to two grantees and delivered it to one Henley with directions to hand it over to the Bank of West Point for safekeeping and for delivery to the two named grantees on the death of the grantor. In *McLendon v. Laird*[62] the court sustained the chancellor's finding of an effectual delivery where the grantor had placed an instrument in a bank vault in an envelope marked "private paper" with a notation on the cover that the deed was to be filed for record on the grantor's death. Subsequently, the grantor made a will in which he attempted to dispose of the property purportedly affected by the deed. The court said that it was necessary that the grantor "lose all right to regain or in any manner control, or make other disposition of the instrument."[63]

Where a deed remains in the possession of the grantor to be delivered and to take effect after his death, the deed is void for want of delivery

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[50]Orloff v. Metropolitan Trust Co., 17 Cal. 2d 484, 110 P.2d 396 (1941).
[51]Clark v. Campbell, 23 Utah 569, 65 Pac. 496 (1901).
[52]Hansen v. Bellam, 161 Ore. 373, 88 P.2d 295 (1939); Foulkes v. Sengstacken, 83 Ore. 118, 163 Pac. 311 (1917).
[53]Smith v. Hardy, 190 So. 180 (La. App. 1939).
[54]Exchange Realty Co. v. Bines, 302 Mass. 93, 18 N.E.2d 425 (1939).
[55]Mantel v. Landau, 134 N.J. Eq. 194, 34 A.2d 638 (1943).
[56]Sutton v. Shanley, 192 S.W.2d 567 (Tex. Civ. App. 1946).
[57]Fulton Land Co. v. Armor Insulating Co., 192 Ga. 526, 15 S.E.2d 848 (1941).
[58]See Note, 15 MICH. L. REV. 579 (1917).
[59]Cox v. Reed, 113 Miss. 488, 74 So. 330 (1917).
[60]See, *e.g.*, Wilcox v. Coons, 362 Mo. 381, 241 S.W.2d 907 (1951).
[61]177 Miss. 522, 171 So. 680 (1937).
[62]211 Miss. 662, 52 So.2d 497 (1951).
[63]*Id.* at 670, 52 So.2d at 500.

during the grantor's lifetime.[64] Thus, in *Davis v. Williams*[65] the court found an invalid delivery where the grantor, having signed, sealed, and acknowledged the instrument, enclosed in it a slip containing a statement that he had deposited the deed for safekeeping and directed it to be handed to his grandchildren. The deed was placed in the bank with the grantor's other documents where it was found on his death four years later. However, if the delivery is complete during the lifetime of the grantor, but the time the grantee is to take is postponed, there is a valid conveyance. It may be said that title passes immediately subject to a life estate in the grantor[66] or that a mere prospect of an estate is created which will ripen into a vested estate only on the death of the grantor, the fee remaining in the grantor in the interim.[67]

In *Wall v. Wall*[68] the grantor executed a deed to his brothers and sisters and provided that it take effect at his death. He reserved to himself the right to revoke at anytime during his life; and he further declared that the execution of the deed and the placing of it among his papers was intended by him as a delivery of the property at his death. It was held that the deed was a present conveyance to take effect in possession at the grantor's death, and the placing of the deed among his papers was a delivery. The correctness of this decision may be questioned because the deed remained in the grantor's control and was subject to his revocation. It seems, however, that where a deed contains a provision that it is not to take effect until the grantor's death, a delivery by the grantor during his lifetime will generally sustain a construction of a present grant of a future estate.[69]

Acceptance

In order to transfer title to land by deed, it is clear that a legal act on the part of the grantor is necessary—he must execute and deliver the deed. But is it essential that there be any act on the part of the grantee? Must there be an acceptance?

In England the rule is that an acceptance is not necessary to transfer title by deed. Title passes by virtue of delivery alone, but there is a right in the grantee to disclaim or repudiate the conveyance.[70] The majority opinion in the United States is that acceptance is a necessary prerequisite to the validity of a transfer of title by deed, the rationale being that the grantor divests himself of title by delivery, and acceptance is the act by which the grantee is invested with title. The concurrent existence of both is essential to the transfer.[71] However, there are qualifications to the general rule. One line of authority asserts that a conveyance by deed is a consensual relationship, but an acceptance will be presumed in the absence of fraud, artifice, or imposition.[72] This enables

64Weisinger v. Cock, 67 Miss. 511, 7 So. 495 (1890).
6557 Miss. 843 (1880).
66Osborn v. Osborn, 42 Cal. 2d 358, 267 P.2d 333 (1954).
67Osgood v. McKee, 343 Ill. 470, 175 N.E. 786 (1931).
6830 Miss. 91 (1855).
69Stubblefield v. Haywood, 123 Miss. 480, 86 So. 295 (1920).
70Mallott v. Wilson, 2 Ch. 494 (1903); Thompson v. Leach, 2 Vent. 198 (K.B. 1696); See Farrar, *Nature of Disclaimer*, 32 L.Q. Rev. 83 (1916).
71See, *e.g.*, Franks v. Scott, 191 So. 175 (La. App. 1939).
72See, *e.g.*, Miller v. Miller, 91 Kan. 1, 136 Pac. 953 (1913).

the grantee to repudiate a conveyance which he may consider to be non-beneficial. Another view is that acceptance will be presumed only in case of grants that are beneficial to minors and incompetents, and to competent adults who know of the transfer and make no objection.[73] Some courts[74] hold that the transfer involves the elements of offer and acceptance, as in the field of contract law, but it is submitted that a transfer by deed does not necessarily involve a contractual relationship.[75]

The requirement of acceptance was vigorously asserted by Justice Simrall in the early Mississippi case of *Kearny v. Jeffries*[76] where he said:

> "A deed is one of the forms of a contract; and to constitute a contract, the grantor and the grantee must concur; the former to convey on the terms mentioned in the instrument, and the latter to accept. There must be the acceptance and assent that it shall be operative as a contract. Where it is beneficial to the grantee, in the absence of countervailing circumstances, delivery will be presumed. . . . The acceptance is necessary and the fact must be proved."

In Mississippi it appears that acceptance need not be by formal or express words or by writing, but may be by acts, conduct, or words of the grantee showing an intention to accept. In *Wilbourn v. Wilbourn*[77] a father wrote his son, who was in the army at the time, and expressed a desire to convey property to him. The son answered, stating either that he did not want the land or that the father could do as he wished. The grantor and his wife then executed a deed and delivered it to the clerk for recording. Prior to the grantee's return, the grantor's wife burned the deed. The grantee knew nothing of what had actually happened; but upon his return learned of the recordation of the deed and moved in with the grantor. In a suit to cancel the deed the grantor claimed that it had never been delivered and accepted. The court held that there was a sufficient showing of an intent to accept since the grantee, upon the discovery of the recorded deed, claimed and took possession.[78] Justice Griffith, in his concurring opinion, summarized the law in Mississippi as to the doctrine of acceptance:

> "The rule as to acceptance is one for the protection of the grantee against having a grant thrust upon him encumbered with a burden or disadvantage. When the grant is entirely beneficial imposing no burden upon him, the reason for requiring an affirmative acceptance disappears and acceptance will be implied in the absence of that which amounts to a renunciation. When as to such a grant, delivery of the deed is made without the knowledge of the grantee and he has thus no opportunity to presently act for himself, the law will put in

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[73]See, *e.g.*, Turner v. Turner, 173 Cal. 782, 161 Pac. 180 (1916).
[74]See, *e.g.*, Bank of Healdsburg v. Bailbache, 65 Cal. 327, 4 Pac. 106 (1884).
[75]Tiffany, *Delivery and Acceptance of Deeds,* 17 MICH. L. REV. 103 (1918).
[76]48 Miss. 343 (1873).
[77]204 Miss. 206, 37 So.2d 256 (1948).
[78]Justice Montgomery dissented, stating that since a deed is a contract, there must be a meeting of the minds, and that here there was no conduct on the part of the grantee evidencing an acceptance until after the deed had been revoked, destroyed, and acceptance made impossible.

an acceptance for him subject to his renunciation when he learns of the deed and its delivery."[79]

While there is language in the *Wilbourn* and *Jeffries* cases indicating that if the conveyance is beneficial to any grantee acceptance will be presumed, there is a statement in the case of *Hall v. Wadill*[80] to the effect that where the beneficiaries are infants, incapable of assent, and the grant is wholly beneficial to them, there is a presumption of acceptance on their part. Also, it is generally held that acceptance is presumed in favor of persons non compos mentis,[81] and Mississippi would probably reach the same conclusion.[82]

The problem of acceptance resolves itself into whether acceptance is an element of delivery or whether it is something separate and distinct. Most jurisdictions take the view that acceptance is merely an element of delivery, and Mississippi seems to be no exception. However, Tiffany asserts that it is more satisfactory to say that it is separate in that it is an indication of the grantee's intention, because if the other view were adopted, the grantor, after having indicated his intention that the conveyance should operate, would have the right until acceptance to change his mind.[83]

Whether a court adopts the English view or the majority American view, the same result usually is reached except where the rights of third parties intervene. In this situation, until the grantee has been informed of the delivery of the deed and has done some act amounting to an actual acceptance, the law will protect the rights of the parties who acquire an interest in or a lien upon the property.[84] While either view may operate as beneficially as the other, either may in some cases be practically impossible of application, especially where the grantee is incompetent; but most courts circumvent this by qualification of the general American rule. It has been suggested that it might be better to classify deeds as beneficial or onerous, and to say that while the former may be disclaimed, they need not be accepted, but that the latter must be accepted in order to transfer title.[85]

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[79]Wilbourn v. Wilbourn, 204 Miss. 206, 37 So.2d 256 (1948).

[80]78 Miss. 16, 27 So. 936, 28 So. 831 (1900).

[81]See, *e.g.*, Pentico v. Hays, 75 Kan. 76, 88 Pac. 738 (1907).

[82]If the incompetent or infant is under competent guardianship, the guardian may accept or disclaim.

[83]4 TIFFANY, REAL PROPERTY § 1061 (3d ed. 1939).

[84]See, *e.g.*, Green v. Skinner, 185 Cal. 435, 197 Pac. 60 (1921).

[85]Rundell, *supra* note 4.

JUDICIAL REVIEW OF ORDERS OF PUBLIC SERVICE COMMISSION REGARDING MOTOR CARRIERS

Introduction

The problems of judicial review of administrative action create a sense of conflict between judicial and administrative supremacy.[1] With the increasing complexity of our economic life there has arisen a need for, and a corresponding growth of, governmental regulation. Courts were thought to be inadequate for the handling of some of the new types of legal-economic problems which have arisen, with the result that these questions have been relegated to administrative agencies for supervision. By way of counterattack, the forces opposing governmental regulation have sought to restrict the finality of administrative action by urging extensive judicial review of such action.

In 1938 the Mississippi Legislature created the Public Service Commission, abolishing the Railroad Commission, and conferring the latter's powers and duties upon the successor.[2] The jurisdiction of the Commission is set out by statute.[3] Circuit or chancery courts have the power to grant relief to litigants aggrieved by action of the Commission, and the decisions of such courts are subject to appeal by the aggrieved party to the Mississippi Supreme Court.[4] The usual relief granted by a chancery court is an injunction against an order of the Commission.[5] If an aggrieved party so elects he may appeal to the Circuit Court of the First Judicial District of Mississippi. He must do so within six months from the date of the final order or finding of the Commission. The procedure of appeal to the circuit court from the Commission is the same as that required in a regular appeal from the circuit court to the supreme court.[6]

In order for an appeal to be perfected a bond must be filed to pay the cost of the appeal in the amount of five hundred dollars with two sureties, or with a surety company qualified to do business in Mississippi. A supersedeas bond on any appeal may be allowed by the Commission with such surety as it considers sufficient, and the Commission may require at any time an increase of any supersedeas bond that may have been granted. A writ of supersedeas may be obtained from the judge of the first circuit court district upon application therefor within six months after the date of the order or finding of the Commission from which appeal is made. A supersedeas bond for the amount fixed by the judge may then be filed. Supersedeas bonds and appeal bonds are all made payable to the state.[7] Appeals from judgments of the circuit court or decrees of the chancery court may be taken as other appeals are taken to the supreme court.[8]

If an aggrieved party does not choose to exercise the privilege of direct appeal, he may, within ten days after the date of the order of the

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[1] LANDIS, THE ADMINISTRATIVE PROCESS 123 (1938).
[2] MISS. CODE ANN. § 7703 (1942).
[3] MISS. CODE ANN. §§ 7635, 7637 (1942).
[4] MISS. CODE ANN. §§ 7683, 7699 (1942).
[5] Mississippi Railroad Comm'n v. Mobile & O.R.R., 117 Miss. 257, 78 So. 153 (1918).
[6] MISS. CODE ANN. §§ 7683, 7699 (1942).
[7] MISS. CODE ANN. § 7700 (1942).
[8] MISS. CODE ANN. § 7711 (1942).

Commission, have the entire proceedings removed by certiorari to the circuit court of the first judicial district for an examination of the record for errors of law.[9]

The "Substantial Evidence" Rule

The Public Service Commission is an administrative agency and does not possess the power to render a final judgment or order.[10] The following is Dean Kimbrough's language in regard to judicial review of action by administrative agencies in Mississippi:

> "The Mississippi Court has definitely established a liberal attitude in the the much mooted matter of scope of judicial review. The position of the court is clear; it will not substitute its own judgment on the facts for the findings of the administrative agency, unless injustice, arbitrariness and fraud are apparent in the finding. If a legal question is involved in the finding of the agency, it creates a sufficient necessity for a review of the finding by the court."[11]

The language of the Mississippi Supreme Court on the question of judicial review of orders of the Public Service Commission is equally as emphatic:

> "That a court of competent jurisdiction has the power to review any order made by an administrative commission to determine if it is supported by substantial evidence, within the meaning of that term, or is purely arbitrary or capricious, beyond the power of the commission to make, or violates some statutory or constitutional right of an interested party is so well settled as not to be open to any doubt.... In reviewing such order 'power to make the order, and not the mere expediency or wisdom of having made it, is the question.' "[12]

The following cases illustrate the Mississippi Supreme Court's application of the "substantial evidence" rule in reviewing orders of the Public Service Commission regarding motor carriers.

In *Magee Truck Lines, Inc. v. Bond,*[13] the statute involved required carriers to have certificates of convenience and necessity, and contained a "grandfather" clause which provided that a certificate should issue to any carrier which was in "bona fide operation" over the route claimed on January 1, 1938, and which had so operated since that time. Magee Truck Lines appealed from a judgment affirming a Commission order granting a certificate to one Bond under the "grandfather" clause. The court ruled that the Commission was the judge of the credibility of the

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9Miss. Code Ann. §§ 7708, 7710 (1942).

10"The findings and determination of matters committed to the railroad commission. . .are not final and conclusive, and it was never so intended by the statute. . . . [T]he reasonableness, and consequently the lawfulness, of its determination, is left subject to judicial inquiry and decision." Western Union Tel. Co. v. Mississippi Railroad Comm'n, 74 Miss. 80, 92, 21 So. 15, 17 (1896).

11Kimbrough, *Mississippi Supreme Court Decisions on Administrative Law,* 17 Miss. L.J. 127, 140 (1945).

12Dixie Greyhound Lines, Inc. v. Mississippi Pub. Serv. Comm'n, 190 Miss. 704, 713, 714, 200 So. 579, 580, *suggestion of error overruled,* 1 So.2d 489 (1941).

13190 Miss. 428, 200 So. 586 (1941).

testimony, and that the court was not authorized to substitute its judgment for that of the Commission where there was substantial (more than a scintilla of) evidence to support its finding. The evidence showed only one shipment prior to January 1, 1938, and only sporadic shipments after January 1. The court reversed because the record did not contain substantial evidence to sustain the Commission, but *clearly* showed that the applicant was *not* engaged in "bona fide operation." The case of *Gulf, M. & O.R.R. v. Luter Motor Express*[14] also involved an application for a certificate under the "grandfather" clause. The court was not favorably impressed with the nature of the testimony adduced to establish a "bona fide operation" in compliance with the "grandfather" clause, but felt that the ambiguities presented and the inferences therefrom were for the appraisal of the Commission, and since the testimony was supplemented by oral proof not inconsistent with its findings, the court failed to find sufficient basis for substituting its judgment for that of the Commission.

In *Tri-State Transit Co. v. Mobile & Ohio Transp. Co.*,[15] a subsidiary bus company of the G. M. & O. Railroad applied for a certificate of convenience and necessity to operate a line in competition with the transit company. Both companies also applied for a new route. The Public Service Commission granted Tri-State the certificate for the new route and the circuit court reversed. The supreme court reversed the circuit court and reinstated the order of the Commission. The court was of the opinion that the sole question presented for decision was whether or not the Commission's decision was either arbitrary, not supported by substantial evidence, or manifestly against the evidence. The court found that there was ample evidence offered by each of the applicants to justify the Commission in deciding the question either way. Therefore, it was within the province of the Commission to determine from the proof which of the two applicants was better equipped to render the service needed, and whether the public convenience and necessity would be best served by granting the certificate to the appellant. The court felt that it would not be justified in substituting its judgment for that of the Commission. Again, in *Tri-State Transit Co. v. Gulf Transport Co.*,[16] the circuit court had reversed, in part, an order of the Commission. The statute[17] requires that in determining whether the certificate shall be granted, the Commission shall give due consideration to the present transportation facilities over the proposed route of the applicant, the volume of traffic over the route, the financial condition of the applicant, and the condition of the highway. In reinstating the order of the Commission the supreme court held that the Commission was in a much better position than the court to pass upon such matters, because the Commission had before it the highway and transportation situation of the entire state, and had facilities for acquiring information relative thereto. With such information available, the Commission is able to fit into the transportation situation particular cases which may come before it. The court does not have before it the over-all picture of the needs and adequacy of present transportation facilities, the condition of the highways, and the amount of travel to enable it to determine as efficiently as

14194 Miss. 407, 12 So.2d 420 (1943).
15191 Miss. 364, 2 So.2d 845 (1941).
16201 Miss. 744, 29 So.2d 825 (1947).
17MISS. CODE ANN. § 7642 (1942).

the Commission the various questions which arise under such an intricate system. "However much this Court, or any member thereof, may differ with the conclusions of the Commission, or doubt the wisdom of its action, we should not substitute our judgment therefor and reverse such action unless it is beyond the powers of the Commission, or not supported by substantial evidence, or is arbitrary or capricious."[18]

The foregoing cases suggest that the court in reviewing orders of the Commission is always guided by the "substantial evidence" rule. Such, however, has not always been the case.

In *McGehee v. Wolchansky*,[19] the statute[20] involved provided for, and authorized the purchase of, a certificate of convenience and necessity with the approval of the Commission upon a finding that the transaction was in good faith, that the purchaser was fit and able to perform the transportation, and that the transaction was otherwise consistent with the public interest. In this case the first two requirements were admitted, but the appellants denied that the third requirement had been satisfied. While the court affirmed the order of the Commission approving the purchase, it did so on the basis of its own independent determination that the transfer was consistent with the public interest, and did not attempt to apply the "substantial evidence" rule.

Existing Service Given Preference

In 1944 the supreme court decided the case of *Tri-State Transit Co. of Louisiana, Inc. v. Dixie Greyhound Lines, Inc.*,[21] and, in so doing, announced the rule that "a certificate should not be granted where there is existing adequate service over the route applied for, and, if inadequate, unless the existing carrier has been given an opportunity to furnish such additional service as may be required." In this case, Dixie Greyhound Lines sought an additional certificate of convenience and necessity to operate a route over which Tri-State was already operating. Because of the increased volume of wartime traffic, some of Tri-State's passengers were having to stand, while Dixie Greyhound, operating on an interstate schedule over the same route, had empty seats. The Commission, after hearing over thirty witnesses for each carrier, denied the franchise. The circuit court reversed the Commission to the extent that it permitted Dixie Greyhound to operate buses as applied for until six months after the end of the war. The supreme court reversed the lower court, and reinstated the judgment of the Commission.

In 1950, in *Dixie Greyhound Lines, Inc. v. American Buslines, Inc.*,[22] American Buslines applied for a certificate to operate over a certain route and was opposed by Dixie and others. The Commission heard evidence that Dixie's service was inadequate and had been inadequate through the years. Dixie contended that it was furnishing adequate service and signified that it was ready, willing, and able to furnish additional service. After hearing the evidence, the Commission granted American Buslines' application. This order was affirmed by the circuit court. The supreme

18 201 Miss. at 762, 29 So.2d at 830.
19 217 Miss. 88, 63 So.2d 549 (1953).
20 Miss. Code Ann. § 7652 (1942).
21 197 Miss. 37, 19 So.2d 441 (1944).
22 209 Miss. 874, 48 So.2d 584 (1950).

court held that the certificate which had been granted was contrary to law, inasmuch as granting the certificate amounted to duplication.

In 1951, in *Southern Bus Lines, Inc. v. Mississippi Pub. Serv. Comm'n*,[23] the applicant already held a franchise to operate over two routes, one from north to south in eastern Mississippi and another from Jackson to the south. It sought permission to connect its two lines by operating from Newton to Jackson. The Commission granted the certificate, but only to the extent of allowing the applicant to transport its own passengers from Newton to Jackson and from Jackson to Newton. Even though there was testimony to the effect that the new service would be an improvement over the existing schedule, and that a direct service to Jackson without change was preferred, the supreme court overruled the circuit court and the Commission on the ground that there was not substantial evidence showing inadequate service to warrant duplication. Finally, *West Bros., Inc. v. H. & L. Delivery Service, Inc.*,[24] in 1954, held that where a previously certificated carrier held a certificate, the Commission did not, even upon a determination of inadequate service, have authority to grant a certificate allowing duplication of service without first giving the previously certificated carrier reasonable time within which to render additional service.

Conclusion

It is submitted that the rule which the court has established in its most recent decisions is unfair to applicants, and detrimental to the public interest. At present, in almost every case where additional service is needed by the public, or would be most beneficial to the public interest, an existing certificated carrier can wait until an application has been filed and evidence presented, and then can testify that even though his service has been inadequate, he will put on additional schedules and will improve the situation (which he should have done long before), and can thereby cause the application to be denied. Certainly it was never the intention of the law to permit a carrier holding a certificate of convenience and necessity to operate in a manner most advantageous to him and to the detriment of the public, and then when faced with an application for a certificate to operate over the same route, contend that he should be protected because he is now improving his service.

Judicial review is necessary in the field of administrative law. There is, however, a limit to judicial review, and when it exceeds this limit it invades the particular administrative agency's prerogative. The Public Service Commission was created as a special agency with the necessary facilities to gather together all information pertaining to transportation in Mississippi. One of its most important responsibilities is that of determining whether or not there exists a need for additional transportation facilities within the state, and what carrier is most capable of satisfying such a need in the best interest of the public. In the light of these most recent decisions of the Mississippi Supreme Court, it appears that judicial review of orders of the Public Service Commission has been extended to such a degree that this responsibility is no longer that of the Commission but that of the supreme court.

Edward L. Cook, Jr.

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[23] 210 Miss. 606, 50 So.2d 149 (1951).
[24] 70 So.2d 870 (Miss. 1954).

Substituting a Trust for a Will*

Prior to the passage of the Statute of Wills[1] in 1540, it was necessary to adopt the use as a means of devising land by will. Subsequent to this statute, it has been unnecessary to employ the use, or its successor, the trust, as a substitute for a will.[2] Substituting a trust for a will has distinct advantages today, however, and it is the purpose of this Comment to clarify the present law as it affects such substitution.

Among the reasons for substituting a trust for a will are: (1) to avoid inheritance taxes, (2) to dispense with the formalities of execution and the danger that the will may fail for want of proper compliance therewith, and (3) to avoid the expense and delay which accompany the administration of estates.[3] By the use of a trust one can circumvent the disadvantages of a will and still provide that his property pass, upon his death, to persons other than his heirs or next of kin. It is essential, however, that the trust conform to the law regarding trusts, and that it be more than a testamentary disposition of property.

Some reasons for the substitution having been manifested, it is now of primary importance to consider what can be done by way of the trust that makes it a satisfactory substitute for the will. The will has been defined as "an instrument by which a person makes a disposition of his property to take effect at his decease, and which is, in its own nature, ambulatory and revocable during his life."[4] Although it cannot be taken as a certainty, there is authority for the proposition that "a trust, otherwise effective, is not rendered nugatory because the settlor reserves to himself the following rights and powers: (1) The use of the property and the income therefrom for life; (2) the supervision and direction of investments and reinvestments; (3) the amendment or modification of the trust agreement; (4) the revocation of the trust in whole or in part; (5) the consumption of the principal."[5] Even though there are certain limitations to the above rights and powers, it is easily seen that the settlor of a trust who makes the proper reservations in the trust agreement can accomplish almost the same results as the testator can accomplish by a will.

The validity of a trust which contains unequivocal powers of modification and revocation with a requirement for the payment of income to the settlor during his life was asserted as early as 1858 in *Stone v. Hackett*.[6] That the power to change the terms of the trust would not affect its validity was maintained in *Kelly v. Snow*.[7] The reservation of the right by the settlor to withdraw the principal from the trust, as not defeating the trust, was established by *Davis v. Ney*.[8] The validity of the reservation of income to the settlor for life was confirmed in *Viney v.*

*Selected as the prize winning paper for the annual award presented by the Deposit Guaranty Bank and Trust Company of Jackson, Mississippi, for the outstanding essay in one of the fields of estates, trusts, or taxation.

1 32 Hen. VIII, c. 1 (1540).

2 Leaphart, *The Trust as a Substitute for a Will*, 78 U. Pa. L. Rev. 626 (1930).

3 *Ibid.*

4 McDaniel v. Johns, 45 Miss. 632, 641 (1871).

5 Cleveland Trust Co. v. White, 134 Ohio St. 1, 6, 7, 15 N.E.2d 627, 629 (1938).

6 12 Gray 227 (Mass. 1858).

7 185 Mass. 288, 70 N.E. 89 (1904).

8 125 Mass. 590, 28 Am. Rep. 272 (1878).

Abbott.[9] These decisions were upheld in the renowned case of *Jones v. Old Colony Trust Co.*,[10] which is valid authority today.[11] That the settlor may reserve the power to change beneficiaries is also a well established rule.[12]

According to the definition of a trust by the court in *Cleveland Trust Co. v. White*,[13] a settlor may also reserve the power to supervise and direct investments and reinvestments, and the right to consume the principal. As to the former proposition, the settlor should be careful not to completely divest the trustee of all discretion, thereby making him merely an agent.[14] As to the latter proposition, there is a conflict of authority.[15]

In the case of *Union Trust Co. v. Hawkins*,[16] the Court of Appeals of Ohio, in 1927, ruled that the alleged trust agreement, which required the owner's approval of all investments by the trustee, among other things, merely served to appoint the trustee as the owner's agent, and was invalid. Evidently this decision gathered some attention during the next two or three years,[17] but was reversed, upon appeal, by the supreme court of the state.[18] In *Warsco v. Oshkosh Sav. & Trust Co.*[19] the court held the trust invalid where the settlor transferred a certificate of deposit to the trustee with the provision that the trustee pay to him any money derived from the certificate, the settlor retaining full control over the trust property so that he could use it as he pleased, the trustee becoming his agent to hold title, invest, sell and collect income for him, and to pay as he directed. However, it has also been held that where the settlor reserved actual management of the property during his lifetime, the trustee's active duties not beginning until the settlor's death, this was not, in itself, fatal to the trust.[20]

The *Warsco* case is also authority for the proposition that the reservation of the power of revocation is substantially different from the reservation of the right to consume the principal. This court held that "a revocation implies the cessation and extinguishment of the trust, and when made operates to put an end to it, not to carry out its terms,"[21] and the reservation of the power to revoke does not affect the validity of the trust. However, the provision in this case that the property pass by the trust only in case of the death of the settlor before the property

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[9]109 Mass. 300 (1872).

[10]251 Mass. 309, 146 N.E. 716 (1925).

[11]See Stahler v. Sevinor, 324 Mass. 18, 84 N.E.2d 447 (1949) (to amend); United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946) (to revoke); Central Trust Co. v. Watt, 139 Ohio St. 50, 38 N.E.2d 185 (1941) (reservation of income).

[12]Siter v. Hall, 220 Ky. 43, 294 S.W. 767 (1927); Wilcox v. Hubbell, 197 Mich. 21, 163 N.W. 497 (1917).

[13]134 Ohio St. 1, 15 N.E.2d 627 (1938).

[14]Stoddard v. Eaton, 22 F.2d 184 (D. Conn. 1927); Russell v. Webster, 213 Mass. 491, 100 N.E. 637 (1913); Union Trust Co. v. Hawkins, 161 N.E. 548 (Ohio Ct. App. 1927).

[15]See Annot., 73 A.L.R. 218 (1931).

[16]161 N.E. 548 (Ohio Ct. App. 1927).

[17]See Leaphart, *supra* note 2, at 630; Scott, *Trusts and the Statute of Wills*, 43 HARV. L. REV. 521, 533 (1930).

[18]Union Trust Co. v. Hawkins, 121 Ohio St. 159, 167 N.E. 389 (1929).

[19]183 Wis. 156, 196 N.W. 829 (1924).

[20]Keck v. McKinistry, 221 N.W. 851 (Iowa 1928).

[21]196 N.W. at 830.

was consumed made the trust invalid. The reasoning of this court was that "if the creator called for the money he would not be revoking the purported trust, but merely requesting its enforcement, and that with such a control the party named as trustee was simply an agent."[22] There appears to be little reason for the distinction.[23]

Before proceeding it would be well to point out that the reserved powers with which we are here concerned are considered by the courts to be conditions subsequent.[24] "In such cases, title to the trust property passes to the trustee by virtue of the trust instrument and the beneficiaries take vested interests in the property, and the powers reserved to the trustor amount to conditions subsequent, upon the happening of which the vested interest would become divested."[25] It should be understood, however, that while reserving these powers the settlor cannot also retain such dominion over the property that no right is vested in the beneficiary.[26] The settlor should also be careful to expressly reserve the power to revoke in whole or in part, if he so desires, because the power to revoke the entire trust does not carry with it the power to revoke in part.[27]

The once recognized case of *McEvoy v. Boston Five Cents Sav. Bank*[28] is another decision of interest. In that case the settlor conveyed a savings deposit to a trustee, in trust to pay her whatever she desired during her life, and at her death, to pay to her husband a small sum weekly, and at his death to apportion the remaining amount among certain relatives. The settlor had expressed a desire that the instrument be in lieu of a will. The court, in holding the trust invalid, decided that as a matter of law the provisions of the instrument for the disposition of the property after the death of the settlor were testamentary, and added that "the evidence justified a finding by the trial court that the paper was intended as a mere testamentary disposition of property, and not as a creation of a trust for any other purpose."[29] In *Jones v. Old Colony Trust Co.*[30] the court distinguished and supported the *McEvoy* case on the ground that the alleged trustee had none of the usual powers of a trustee and was, therefore, merely an agent of the settlor.[31] The *McEvoy* case has been expressly overruled by *National Shawmut Bank v. Joy*.[32]

The court in the *National Shawmut Bank* case held that the *McEvoy* trust was not testamentary because of the power of revocation[33] or the right to withdraw the principal.[34] Furthermore, it was stated that:

"The alternative or additional ground of decision implies that

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22Leaphart, *supra* note 2, at 630.

23*Id.* at 629.

24Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938).

25Goodrich v. City Nat'l Bank & Trust Co., 270 Mich. 222, 258 N.W. 253 (1935); see Annot., 118 A.L.R. 482 (1939).

26*In re* Tunnell, 325 Pa. 554, 190 Atl. 906 (1937).

27National Newark and Essex Banking Co. v. Rosahl, 97 N.J. Eq. 74, 128 Atl. 586 (1925).

28201 Mass. 50, 87 N.E. 465 (1909).

29*Id.* at 55, 87 N.E. at 466.

30251 Mass. 309, 146 N.E. 716 (1925).

31See Scott, Trusts § 57.2 (1939).

32315 Mass. 457, 53 N.E.2d 113 (1944).

33Stone v. Hackett, *supra* note 6, is cited.

34Davis v. Ney, *supra* note 8, is cited.

> a purpose on the part of a settlor to employ a trust deed in order to avoid making a will makes testamentary and void what otherwise would be a valid settlement inter vivos. We think that that proposition is not law. We do not agree with the characterization of the *McEvoy* case, contained in the opinion in the *Jones* case, whereby the *McEvoy* case is distinguished and supported."[35]

This decision seems to make valid a trust which is intentionally substituted for a will, if the other provisions of the trust are not fatal to it. "The law prohibits only an unattested disposition that takes effect in a testamentary manner."[36]

It has been held that the mere fact that the settlor of a trust may have desired to avoid a compliance with the statutes pertaining to the execution of wills, or to avoid the necessity of probate administration, does not void the trust.[37] In the case of *Roche v. Brickley*,[38] where the settlor's intention was clearly expressed in writing to place "her property in such a way that her husband would not share in its distribution on her death,"[39] it was held that the trust was valid. The same proposition was supported in *Sturgis v. Citizens' Nat'l Bank*,[40] where the husband defeated the wife's rights. Both decisions are based on the settlor's unqualified right to make gifts of personalty during his or her lifetime. It has also been held that it is not against public policy that the use of the trust affords a means of avoiding state and federal inheritance taxes, or hinders the collection of such taxes.[41] Certainly, however, one cannot use the trust to defraud his creditors.[42]

This Comment would not be complete without a survey of the cases in which the trustee is also the settlor of the trust, retaining for himself a life estate and the power to revoke in whole or in part. It would seem that such trusts would generally be invalid because the settlor is retaining such dominion over the property that no right is vested in the beneficiary.[43] However, there is substantial authority to the effect that where such trusts are in the form of bank deposits, they are valid as "tentative trusts." The leading case in support of this proposition is *Matter of Totten*.[44]

In the *Totten* case the doctrine of tentative trusts was set forth as follows:

> "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor

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35 53 N.E.2d at 126.
36 *Id.* at 122.
37 Whalen v. Sevircin, 141 Neb. 650, 4 N.W.2d 737 (1942).
38 254 Mass. 584, 150 N.E. 866 (1926).
39 *Id.* at 586, 150 N.E. at 867.
40 152 Md. 654, 137 Atl. 378 (1927).
41 Goodrich v. City Nat'l Bank & Trust Co., 270 Mich. 222, 258 N.W. 253 (1935).
42 Leaphart, *supra* note 2, at 634.
43 This conclusion is reached in view of such decisions as *In re* Tunnell, 325 Pa. 554, 190 Atl. 906 (1937).
44 179 N.Y. 112, 71 N.E. 748 (1904).

dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."[45]

"Totten trusts" have been expressly upheld as recently as 1951 by *In re Halpern's Estate*.[46] The court in that case cited the rule in *Newman v. Dore*[47] that a grantor's conveyance will be illusory if "intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed,"[48] and held that there was nothing illusory about a "Totten trust," as such, and proof that such a trust was set up to defeat the settlor's wife's rights by descent and distribution did not render the trust illusory.[49]

In Mississippi the case of *Ladner v. Ladner*[50] seems to be authority for the validity of "Totten trusts." Although the *Totten* case is not cited in the opinion given by the court, the decision is substantially the same as that given in the *Totten* case. In the Mississippi case the settlor made a time deposit in a savings bank in the name of himself and another. At that time he informed the cashier of his desire to place the money in the bank in the name of the other party in such a way that he, the depositor, could draw the interest while he lived, with the money going to the other person at his death. The settlor had the right to withdraw money whenever he so wished. The court held that the trust was valid, the equitable title to the principal passing to the beneficiary, vesting in praesenti, to be enjoyed in futuro, upon the death of the settlor-depositor.

In Mississippi, along this line, are the "joint tenancy bank deposit cases," which should not be overlooked. The two leading cases in this field appear to be *In re Lewis' Estate*[51] and *Stephens v. Stephens*.[52] In the former case the court held that where a bank deposit is made in the name of two persons payable to either, in the absence of evidence to the contrary, the presumption created by statute[53] is sufficient to establish the rights in, or title to, the money in the survivor. The *Stephens* case holds that where there is a clear intention to create a right which contains the essential elements of joint ownership and survivorship in respect to a

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45*Id.* at 125, 71 N.E. at 752.

46303 N.Y. 33, 100 N.E.2d 120 (1951).

47275 N.Y. 371, 9 N.E.2d 966 (1937).

48*Id.* at 381, 9 N.E.2d at 969.

49100 N.E.2d at 122.

50128 Miss. 75, 90 So. 593 (1922). *Accord,* Williams v. Bailey, 174 Miss. 760, 165 So. 439 (1936).

51194 Miss. 480, 13 So.2d 20 (1943).

52193 Miss. 98, 8 So.2d 462 (1942).

53Miss. Code Ann. § 3809 (1930) provided that: "When a deposit has been made or shall hereafter be made in the name of two persons, payable to either, or payable to either or the survivor, such deposit or any part thereof or interest or dividends thereon, may be paid to either of the said persons whether the other be living or not, and the receipt or acquittance of the person so paid shall be valid and sufficient release and discharge to the bank for any payment so made." Section 5205 of the 1942 Code, as amended, which replaces the above section, is not so changed as to substantially affect the problem here under consideration.

bank deposit, that intention, when lawfully manifested, should be given effect, and the survivor held entitled to the fund. A 1953 Mississippi case, *Stewart v. Barksdale*,[54] supports the *Stephens* case. It is submitted that these cases, although of particular interest, do not materially affect the problem here under consideration. They are based upon a presumption created by statute. They permit certain benefits of the trust to take effect without the necessity of proving that a trust was intended; but it is not the purpose of this Comment to discuss the possible substitution of the joint tenancy bank deposit for the trust.

In conclusion, by the use of the trust one may make what is apparently a testamentary disposition of his property without complying with the statutes affecting wills. The settlor of a trust may reserve to himself the income from the property for life, the privilege to alter or amend, the power to revoke in whole or in part, and the rights to change beneficiaries and to appoint new trustees. It will, of course, be necessary for the settlor to take the essential steps to transfer title of the property to the trustee, or, if he is to be the trustee, to manifest the intent to hold the property in trust.[55] The trustee should be given some duties to perform so that he will not be held a mere agent. In view of *Warsco v. Oshkosh Sav. & Trust Co.*, the settlor will be wise to use words of revocation rather than consumption. On the strength of such comparatively modern decisions as *Cleveland Trust Co. v. White* and *National Shawmut Bank v. Joy* it is submitted that not only will trusts continue to be satisfactory substitutes for wills, but will be held valid even when there is an expressed intention, by the settlor, to avoid making a will and to avoid the statutory requirements regarding wills.

Harry C. Griffith

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[54]216 Miss. 760, 63 So.2d 108 (1953).

[55]In the case of real property there must be some written memorandum to satisfy the prevailing Statute of Frauds. Leaphart, *supra* note 2, at 627.

RECENT DECISIONS

ADMIRALTY—ACTION FOR UNSEAWORTHINESS RESULTING FROM ASSAULT BY FELLOW SEAMAN

Action by seaman against owner and operator of vessel for injuries and loss of wages resulting from an assault by a fellow seaman while on board ship. During the course of a drinking party, a seaman went into plaintiff's room and took a bottle of brandy from under plaintiff's bed. Plaintiff awoke, and the seaman attacked him with the bottle, causing severe injuries. HELD: Assailant was a person of dangerous propensities; plaintiff was allowed to recover for breach of warranty of seaworthiness. *Boudion v. Lykes Bros. S.S. Co.*, 75 S. Ct. 382 (1955).

Numerous English cases since the early 1800's have laid down the rule that a ship owner is liable for damages occasioned by his failure to properly equip his vessel; and that a competent master and crew are part of proper equipment.[1] But the rule was enunciated in actions brought by the owner against insurers of the ship's cargo, and it seems reasonable to assume that neither its application in actions brought by injured seamen nor its citation in support of a doctrine of liability without fault was ever comtemplated by the deciding jurists.[2] In *The Osceola*,[3] the United States Supreme Court ruled that a vessel and her owners are liable, to the extent of maintenance and cure during the course of a voyage, when a seaman falls sick or is wounded while on such voyage. However, the Supreme Court did not allow the injured seaman to recover from the owner for injuries suffered through the negligence of another seaman, because of the common law fellow-servant rule, but it did recognize that the case might be different if the action had been for unseaworthiness. It should be noted that *The Osceola* was decided in 1903, prior to the passage of the Jones Act.[4] Subsequent cases show an expansion of the seaman's remedy from "maintenance and cure" to broader remedies based on liability without fault, as illustrated in the subject case.[5]

In *The Rolph*,[6] a seaman recovered on the ground of unseaworthiness for injuries received at the hands of a brutal mate.[7] This was the first of a series of cases allowing a recovery for unseaworthiness, under the theory that it is the master's or owner's duty to equip the vessel not only with seaworthy appliances, but also with a competent

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[1]Walker v. Maitland, 5 B. & Ald. 172 (1821); Busk v. Royal Exchange Assurance Co., 2 B. & Ald. 76 (1818).

[2]Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[3]189 U.S. 158 (1903). This case outlined the following principles: "1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued. 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. 3. That the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure. 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

[4]Merchant Marine Act, 1920 (Jones Act), 41 STAT. 1007, 46 U.S.C. § 688 (1952).

[5]For a discussion of whether maintenance, cure, and wages bar recovery for compensatory damages, see Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928).

[6]299 Fed. 52 (9th Cir. 1924).

[7]This case was decided after the passage of the Jones Act, which eliminated the common law defenses of assumption of risk and the fellow-servant rule, and allowed the defense of contributory negligence only in mitigation of damages.

crew.[8] One question remained unanswered: Was recovery allowed because the injured party and his assailant were both seaman, or because the assailant was a mate in a position of authority? Presumably, recovery was allowed because the beating was inflicted by a mate, a person in a position of authority.[9] In *Keen v. Overseas Tankship Corp.*[10] Judge L. Hand stated, "Applied to seamen, such a warranty of seaworthiness is, not that the seaman is competent to meet all contingencies; but that he is equal in disposition and seamanship to the ordinary men in his calling." This case was the first to extend the doctrine of unseaworthiness to include conflicts between crew members, and eliminated the necessity for actual knowledge of the crewmember's dangerous character as a prerequisite to recovery. It suggested the trend toward a doctrine of liability without fault in the following sentence: "But suppose there will be many such instances [referring to actions of this type]; that is no reason why an individual seaman who has suffered because his fellow is not up to his work must bear the loss." Subsequent decisions, however, show that it must still be proved that the injuring seaman is not equal in disposition and seamanship to the ordinary man of his calling.[11]

In summary, the ship owner is liable for injuries received by one seaman at the hands of a fellow seaman, provided the assailant is not equal in disposition and seamanship to the ordinary man in the calling. The above quoted statements from the *Keen* case indicate that eventually no such showing will be necessary, and the owner will be held liable for all assaults, provided the complainant is not the aggressor.

Robert A. Pritchard

CRIMINAL LAW—DOUBLE JEOPARDY—MULTIPLE DEATHS ARISING FROM MOTOR VEHICLE ACCIDENTS

Defendant, by the criminally negligent operation of a motor vehicle, killed three persons. On trial for manslaughter,[1] the defendant pleaded in bar his former conviction of manslaughter for the death of one of the other victims.[2] HELD: The former conviction would not bar the subsequent trial, for when a single unlawful act results in the killing of more than one person, each homicide constitutes a separate offense for which the defendant may be tried without twice being put in jeopardy for the same offense. *Burton v. State*, 79 So.2d 242 (Miss. 1955).

It is a well known principle that "no person's life or liberty shall be twice placed

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[8]In The Rolph the mate was "known to be incompetent by reason of brutality of disposition." In Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952), it was said: "Even by way of dictum it [The Rolph] did not say that the result would have been different if they had not had that knowledge."

[9]This theory is very ably discussed in Cain v. Alpha S.S. Corp., 35 F.2d 717 (2d Cir. 1929), where a recovery was allowed against the owner for a beating administered by a subordinate officer.

[10]194 F.2d 515 (2d Cir. 1952).

[11]Following the Keen case, Jones v. Lykes Bros. S.S. Co., 204 F.2d 815 (2d Cir. 1953), denied recovery to a seaman because he did not prove that his assailant was unfit to serve. See Thompson v. Coastal Oil Co., 199 F. Supp. 838 (D.N.J. 1954), *rev'd on other grounds*, 218 F.2d 664 (3d Cir. 1955).

[1]"Every other killing of a human being, by the act, procurement or culpable negligence of another . . . shall be manslaughter." MISS. CODE ANN. § 2232 (1942).

[2]Defendant had received the maximum sentence of twenty years but had been released on "good behavior" after serving ten years. The maximum sentence for manslaughter in Mississippi is imprisonment for not more than twenty years. MISS. CODE ANN. § 2233 (1942).

in jeopardy for the same offense."[3] The conflict comes in determining what constitutes the "same offense." The test generally accepted, known as the "same evidence" test, is: "A conviction or acquittal upon one indictment is not a bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."[4] Although severely criticized,[5] this test was applied by the court in the principal case.

It is well settled that where two injuries result from an intentional act, such as robbing two persons at the same time, there is a separate offense for each person injured.[6] It appeared equally well settled that multiple injuries resulting from an act of negligence constituted only one offense[7] until several recent decisions involving motor vehicle accidents. From a review of these decisions it appears that a majority of the courts have held that each injury constitutes a separate offense only when considering cases involving indictments under different statutes,[8] or offenses that require intent,[9] or sentences that are to run concurrently.[10] Where the injury results from an act, the pri-

[3]It has been incorporated into the fifth amendment to the United States Constitution, the constitutions of forty-three states, State v. Brunn, 22 Wash. 2d 120, 154 P.2d 826 (1945), and is considered a part of the common law in the other five, Note, 38 BROOKLYN L. REV. 79 (1937).

[4]MILLER, CRIMINAL LAW § 187 (1934). This test first was laid down in Rex v. Vandercombe, 2 Leach 708, 168 Eng. Rep. 455 (1796). For a discussion of various modifications of this test see Note, 38 BROOKLYN L. REV. 79, 82 (1937).

[5]Kircheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513 (1954). See Notes, 54 WIS. L. REV. 395 (1954) and 27 N.Y.U.L. REV. 506 (1952).

[6]Johns v. State, 130 Miss. 803, 95 So. 84 (1923). See Kenney v. State, 67 Tex. Crim. 175, 148 S.W. 783 (1912), for burglary; Berry v. State, 195 Miss. 899, 16 So.2d 629 (1944), for assault with intent to kill; Blitch v. Buchanan, 100 Fla. 1242, 132 So. 474 (1931), for murder. *But see,* Hurst v. State, 24 Ala. App. 47, 129 So. 714 (1930).

[7]People *ex rel.* Flinn v. Barr, 259 N.Y. 104, 181 N.E. 64 (1932), where ten deaths resulting from a fire which allegedly was caused by defendant's negligence were regarded as one offense. In Commonwealth v. Veley, 63 Pa. Super. 489 (1916), several deaths resulting from the breaking of a dam caused by the defendant's negligence were held to constitute a single offense.

[8]In Fleming v. Commonwealth, 284 Ky. 209, 144 S.W.2d (1940), where defendant who had been convicted of voluntary manslaughter was then convicted of involuntary manslaughter, the court held that the first conviction would not bar the subsequent conviction, but reversed on other grounds. In McHughes v. State, 160 Fla. 823, 36 So.2d 786 (1948), where two persons were killed on a motor-scooter, defendant was indicted for manslaughter by culpable negligence, FLA. STAT. § 782-07 (1953), and for manslaughter resulting from intoxication, FLA. STAT. § 860-01 (1953). The court held that in addition to the difference in identity of the victims the statute required proof in other respects. In one the prosecution was required to prove culpable negligence; in the other, intoxication, instead of negligence, had to be proven.

[9]"This was not a situation where the intent was single, as in the case of a thief who at one time steals several articles owned by different persons, but it was a situation where the intent was severable." Webb v. State, 68 Ga. App. 466, 23 S.E.2d 578 (1942). See also Wellons v. State, 77 Ga. App. 652, 48 S.E.2d 922 (1948). In Holden v. Fraser, 215 Ark. 67, 219 S.W.2d 625 (1949) the court held: "If a defendant has a distinct and severable intent to bring about the death of two victims, then each intention is a necessary element of a separate offense against the state, and the defendant may be prosecuted for both offenses." The court distinguished State v. Wheelock, *infra* note 11, by saying that there the deaths resulted from mere negligence. In Fay v. State, 62 Okla. 350, 71 P.2d 768 (1937), the indictments were for assault with intent to kill. In State v. Fredlund, 200 Minn. 44, 273 N.W. 353 (1937), both indictments were for murder under the following statute: "Killing of a human being, when perpetrated by acts eminently dangerous to others, and evincing a depraved mind . . . although without a premeditated design to effect the death of an individual . . . by a person engaged in the commission of, or in an attempt to commit, a felony. . . ." MASON'S MINN. STAT. § 10070 (1927).

[10]State v. Touhy, 31 Wash. 2d 549, 197 P.2d 1014 (1948).

mary element of which is negligence, the courts are equally divided.[11]

Courts that have decided in favor of separate offenses have held that since the wrongdoer is civilly liable to each of the injured parties, it would be inconsistent to hold that he has committed only one crime.[12] Considered in the light of modern criminology and the earlier decisions, it would appear that the decisions holding the act to constitute one offense are the more sound; for the object of criminal law is the protection of society, and the punishment reflected by the separate offenses rule is not directly beneficial to the person injured.[13] This rule conflicts with the spirit of the constitutional provision against double jeopardy. "If the whole offense in the eye of reason and philosophy is one . . . we ought not to presume the legislature meant to punish it as two."[14]

Although it appears that prosecutors have often utilized the "same evidence" test only in order to further the goals of justice, as in cases where the previous proceedings ended in a legally unjustifiable acquittal,[15] or where the additional punishment was desirable in order to secure compliance with the law,[16] it is submitted that a test which has led to such startling results as a holding that seventy-five hands of poker played at one sitting constituted seventy-five offenses[17] should be discarded. It is further submitted that the fixing of punishment should be left to the legislature, and that it would be better to permit a few criminals to escape punishment than to make the double jeopardy guarantee meaningless.

Jess B. Rogers

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[11]One offense: State v. Wheelock, 216 Iowa 1428, 250 N.W. 617 (1933); State v. Pennsylvania R.R., 16 N.J. Super. 360, 84 A.2d 650 (1951); Commonwealth v. Carrol, 131 Pa. Super. 357, 200 Atl. 139 (1938); Smith v. State, 159 Tenn. 628, 21 S.W.2d 400 (1929). See State v. Cooper, 13 N.J.L. 361, 371 (Sup. Ct. 1833). Separate offenses: People v. Allen, 368 Ill. 368, 14 N.E.2d 397 (1937), appeal dismissed for want of jurisdiction, 308 U.S. 511 (1939); *but see* Shaw's dissent, *id.* at 389, 407; Jeppesen v. State, 154 Neb. 765, 49 N.W.2d 611 (1951), dismissed on insufficient evidence. State v. Martin, 154 Ohio St. 539, 96 N.E.2d 776 (1951); Lawrence v. Commonwealth, 181 Va. 582, 26 S.E.2d 54 (1943).

[12]People v. Allen, 368 Ill. 368, 14 N.E.2d 397 (1937); State v. Fredlund, 216 Iowa 1428, 250 N.W. 617 (1933). See Notes, 21 U. CIN. L. REV. 494 (1952), 29 J. CRIM. L. 291 (1938).

[13]GELHART, ELEMENTS OF ENG. LAW 8 (1911). See Note, 21 U. CIN. L. REV. 494 (1952).

[14]State v. Cooper, 13 N.J.L. 361, 371 (Sup. Ct. 1833).

[15]State v. Fredlund, 216 Iowa 1428, 250 N.W. 617 (1933), where two of the witnesses were convicted of giving perjured testimony after the first trial in which defendant was acquitted; see Note, 24 MINN. L. REV. 555, n. 197 (1940). See also People v. Allen, 368 Ill. 368, 14 N.E.2d 397 (1937), where the defendant was previously discharged for want of prosecution because not tried within four months after written demand was made according to statute.

[16]Lawrence v. Commonwealth, 181 Va. 582, 26 S.E.2d 776 (1943), where the court said: "We have no intention of whittling away the responsibility of careless or reckless driving."

[17]Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923). See Ebeling v. Morgan, 237 U.S. 625 (1915), where the cutting with intent to rob six mail bags in one robbery was held to constitute six offenses; Commonwealth v. Andrews, 2 Mass. 409 (1807), where the receipt of goods stolen from each of several owners constituted two offenses, although the goods were received by the defendant at one time and in a single package.

FEDERAL TAXATION—INCOME INCLUDES PUNITIVE DAMAGES AWARDED IN ANTITRUST SUIT

The respondent, a Missouri corporation, brought suit against the Hartford Empire Company for treble damages under the federal antitrust laws[1] and recovered $1,000,000 in full settlement of the claim. Of this sum, one-third represented actual damages, while the remainder constituted punitive damages recoverable under the statute. The Tax Commissioner claimed that the entire $1,000,000 was taxable income, while the respondent contended that it should be required to pay only on the portion which represented actual damages. HELD: On appeal from a decision for respondent in the Tax Court, the punitive damages were taxable. *Commissioner v. Obear-Nester Glass Co.*, 217 F.2d 56 (7th Cir. 1954), *cert. denied*, 75 S. Ct. 570 (1955).

The War Between the States brought on the first attempt by the federal government to tax income,[2] and the initial taxing statute,[3] though not defining income, did state that income from certain designated sources, "or from any other source whatever," should be subject to the tax. The modern era of income taxation, however, had its inception in the adoption of the sixteenth amendment[4] and the subsequent approval, in 1913, of the first series of income tax laws.[5] By the broad language of this act[6] and ensuing ones,[7] Congress indicated that it intended to leave the definition of income to the courts. Seven years later Judge Pitney, in the landmark case of *Eisner v. Macomber*,[8] specified the bounds of income as "the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets." Relying on the *Macomber* definition,[9] courts have, practically without exception, excluded punitive damages, as such, from gross income. In *Central R.R. v. Commissioner*,[10] damages received by a taxpayer in settlement of a suit against a fiduciary for business operations adverse to the taxpayer's were called penalty and windfall, not gain arising from capital or labor, and therefore, not taxable. *Highland Farms Corp. v. Commissioner*[11] followed this same reasoning in deciding that punitive damages imposed by law were not taxable in that they did not meet the *Macomber* test. These cases were specifically reaffirmed in *Commissioner v. Glenshaw Glass Co.*,[12] where treble damages recovered under section 4 of the Clayton Act[13] were held non-taxable. However, Judge Biggs indicated that the decision was made with some reservation by stating that the "position of the United States[14] would indeed, if adopted, bring symmetry into this aspect of the law of income taxation. . . . [B]ut we think if such a result is to be achieved after nearly two decades it should be

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[1] 48 STAT. 896 (1934), 15 U.S.C. § 78p (b) (1951).

[2] See MAGILL, TAXABLE INCOME 335 (rev. ed. 1945).

[3] 12 STAT. 292 (1861).

[4] "The Congress shall have the power to lay and collect taxes on income, from whatever source derived. . . ." U.S. CONST. amend. XVI.

[5] 38 STAT. 166 (1913).

[6] Defining gross income as "gains or profits and income derived from any source whatever."

[7] INT. REV. CODE OF 1954, §§ 61-63.

[8] 252 U.S. 189 (1920).

[9] The definition has been frequently applied. See *e.g.*, Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926); Merchants Loan & Trust Co. v. Smietanka, 255 U.S. 509 (1921).

[10] 79 F.2d 697 (3d Cir. 1935).

[11] 42 B.T.A. 1314 (1940).

[12] 211 F.2d 928 (3d Cir. 1954).

[13] 15 U.S.C. § 15 (1952).

[14] The Commissioner contended that "any money or property coming into the hands of any person is taxable as income unless *specifically exempted.*" (Emphasis added).

effected by the Supreme Court and not by this tribunal."[15]

Notwithstanding these decisions, *General Am. Investors Co. v. Commissioner*[16] held that damages recovered under the antitrust laws were income, but expressly stated that the amount paid over was not punitive damages.[17] Judge Medina, in his affirming opinion,[18] brushed aside the *Macomber* definition[19] and said, "if we consider the words in their plain and popular meaning, as we think they should be, how can there be any doubt that these Sect. 16 (b) payments are 'income'?" The instant case appears to be the first to call damages awarded under federal antitrust laws *punitive*[20] and at the same time specifically hold them to be taxable income.[21]

Punitive damages are undeniable accessions to wealth, and the mere fact that they are extractions from wrongdoers instead of gains from capital or labor should not preclude a taxation of them as income to the recipients. If wages, for which labor is expended, are to be levied upon, in the absence of clear congressional intent to the contrary, there seems to be no feasible reason for exempting punitive damages, which *in toto* enhance the taxpayer's financial status. The rule laid down in the instant case does, indeed, "bring symmetry into this aspect of income taxation."

H. Nolen Fancher

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[15]Judge Biggs apparently conceded that the definition in Eisner v. Macomber was obsolete. His dissatisfaction with it, coupled with his respect for stare decisis, probably prompted his plea to the Supreme Court to settle the controversy. Commissioner v. Glenshaw Glass Co. was subsequently reversed in an opinion consistent with the noted case. 348 U.S. 426 (1955).

[16]19 T.C. 581 (1952).

[17]The court reasoned that since the money paid over to the corporation was "insider profit" to the faithless officer, it was profit to the taxpayer, too. *But see* Park & Tilford Distillers Corp. v. United States, 107 F. Supp. 941 (1952).

[18]211 F.2d 522 (2d Cir. 1954).

[19]Shortly after the Macomber decision, Member Sternhagen, in C. A. Hawkins, 6 B.T.A. 1023 (1927), predicted that the scope of the sixteenth amendment would not forever be limited by a judicial definition and that taxable income would be judicially found, although outside the scope of the Supreme Court decision. Frequent dissatisfaction has been expressed with the definition through the years. "We see nothing to be gained by the discussion of judicial definitions." United States v. Kirby Lumber Co., 284 U.S. 1 (1931). See also Note, *Apparent Abandonment of a Definitive Concept of Income,* 45 HARV. L. REV. 1072 (1932).

[20]"Its obvious purpose is to protect 'outside' shareholders from 'insiders' who could use their superior knowledge of and control over the corporation's future plans to make personal profits by short term dealings in its securities. To effectuate this policy the Act provides that the profits so made shall be turned over to the corporations. The prime purpose of the Act is punitive, to discourage dealings of this type by persons having inside information as to the affairs of the corporation. Clearly the purpose is not compensatory." 217 F.2d at 58.

[21]"There is no rational connection between the source of the taxpayer's gain and his ability to pay. The question is: has he realized an economic gain, from whatever source, which leaves him better able to contribute to the support of his government?. . . There can be no question that the punitive damages recovered by the respondent here greatly enhanced its ability to pay. Realizing that one reason for the adoption of the Sixteenth Amendment was to place the burden of taxation according to the ability to pay, we cannot believe that the term 'income' as used in that Amendment was not intended to include the type of gain involved here. There can be little doubt that Congress intended to include the punitive damages, here involved, in income if it had the constitutional power to do so." 217 F.2d at 61.

LIENS—RELATIVE PRIORITY OF UNITED STATES TAX LIEN AND ATTACHMENT LIEN

Action for wrongful death was filed in an Ohio court against Acri, and certain cash and bonds were attached. Demand for unpaid taxes was made by the United States on Acri some three months after issuance of the writ of attachment. More than a year later, judgment was recovered against Acri in the action for wrongful death. The question presented here was whether the tax lien of the United States, recorded[1] subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment, was superior to the attachment lien. HELD: The Ohio attachment lien was, at the time of its issuance, inchoate, and the lien for unpaid taxes, asserted after issuance of the attachment, but before judgment in the action, had priority, even though Ohio courts treated attachment liens as perfected at the time of attachment. *United States v. Acri,* 75 S. Ct. 239 (1955).

During the past ninety years Congress has passed nine amendments to the Internal Revenue Code which have brought sections 3670-3672 to their present form. The intention of Congress to protect third persons against harsh application of the federal tax lien is indicated in at least five of the nine amendments.[2] With only a priority statute,[3] the Government had had no trouble winning against lien claimants, but the federal tax lien statute[4] made it more difficult for the Government to prevail in the lower courts.[5] Then, in 1950, the Government gained a decided victory in *United States v. Security Trust and Sav. Bank.*[6] Prior to this decision, some thirty cases in the lower courts had not investigated inchoateness of the antedating attachment lien before denying the supremacy of the section 3670 tax lien.[7] The *Security Trust* case held a tax lien of the United States prior in right to an attachment lien which the state had held to be inchoate, where the federal tax lien was recorded prior to the date the attaching creditor received judgment, although subsequent to the date of the attaching lien. State courts, however, avoided investigating inchoateness wherever possible[8] and although the United States Supreme Court overruled these decisions from time to time,[9] doubt was cast on the application of the doctrine of general and inchoate liens to section 3670 cases.

The subject case involves a sequence of events similar to the *Security Trust* case, namely, a writ of attachment, followed by the filing of notice of a tax lien by the United States, later followed by judgment obtained by the attaching creditor. However, in the *Security Trust* case, the California court had held the attachment lien inchoate. In the *Acri* case, the Ohio court held the attachment lien was perfected at the time of attachment. The United States Supreme Court refused to be bound by this characterization and found the attachment lien to be inchoate at the time of attachment. Two other decisions were handed down by the United States Supreme Court on the same date as the *Acri* case which further support the *Acri* and *Security*

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[1]Although a federal tax lien arises against a taxpayer when the assessment list is received by the Collector of Internal Revenue, the Government is not protected against a third person until the federal tax lien is recorded.

[2]Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien,* 63 YALE L.J. 905 (1954).

[3]31 U.S.C. § 191 (1946). The priority statute covers all debts to the Government, but is available only in the case of an insolvent debtor whose property has passed to a third person—other than a trustee in bankruptcy—for the benefit of creditors. Kennedy, *supra* note 2, at 906.

[4]26 U.S.C. §§ 3670-3672 (1939).

[5]New York Casualty Co. v. Zwerner, 58 F. Supp. 473 (N.D. Ill. 1944).

[6]340 U.S. 47 (1950).

[7]Kennedy, *supra* note 2, at 924.

[8]Petition of Gilbert Associates, Inc., 97 N.H. 411, 90 A.2d 499 (1952).

[9]United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953).

Trust cases.[10] Both holdings were based on attachment liens being inchoate, in the federal sense, at the time the Government's liens were filed.

The instant case sets the controversy regarding the application of the doctrine of the general and inchoate lien to section 3670 cases at rest. The *Security Trust* case had held a tax lien of the United States prior in right to an attachment lien which California held to be contingent and inchoate until the attaching creditor obtained a judgment, where the federal tax lien was recorded prior to the date the attaching creditor obtained judgment, although subsequent to the date of the attachment. The *Acri* case holds further that when a state has designated a lien as inchoate, the United States Supreme Court will follow this characterization; but, if a state declares an attachment lien perfected, the Supreme Court will not follow this classification, but will re-examine the facts. Thus, upon examining the attachment lien in the *Acri* case, the Supreme Court found it to be an inchoate lien for federal tax purposes, because at the time the attachment issued, the amount of the lien was contingent upon the outcome of the suit for damages.[11]

Shortly after the *Acri* case, the Supreme Court of Mississippi decided *United States v. Colotta*,[12] which presented the question whether a federal tax lien is prior in right to Mississippi's statutory mechanic's lien[13] where the federal tax lien attached subsequent to the effective date of the mechanic's lien but prior to institution of action on the mechanic's lien. The court held that the mechanic's lien existed from the time the contract was made; that it was a definite, fixed lien with identity of lienor, property subject to the lien, and amount of the lien established; that it was a specific lien which attached to specific property and was not contingent upon establishment by legal proceedings; and that, therefore, the federal tax lien should not be given priority. If this case, or a similar one, is presented to the Supreme Court of the United States, the *Acri* and *Security Trust* decisions indicate that it will not necessarily follow the state court's characterization of the mechanic's lien as perfected at the time the contract was made, but will re-examine the facts.

Josephine P. Johnson

MINES AND MINERALS—EFFECT OF EXCEPTION IN OIL AND GAS LEASE

Defendant executed an oil, gas, and mining lease to plaintiff's assignor on the following described land in Forrest County, Mississippi: "E ½ of Lot 6, Lots 7 & 8 (except G & S I R R Right-of-way through said lots). . . ."[1] HELD: Where oil and gas lease contained phrase excepting railroad right-of-way through property leased, and the right-of-way had previously been abandoned and was dead at the time of the lease, the lessor had full title to the land and the minerals under the land formerly

[10]United States v. Scovil, 75 S. Ct. 244 (1955); United States v. The Liverpool & London & Globe Insurance Co., 75 S. Ct. 247 (1955).

[11]It is to be noted that the issue involved in all the cases discussed will arise only in non-bankruptcy situations because the order of payment is prescribed in the Bankruptcy Act.

[12]79 So.2d 474 (Miss. 1955).

[13]MISS. CODE ANN. § 356 (1942).

[1]The lease in question also contained what is usually called the "Mother Hubbard" clause in the following words: "It is the intention of the lessor and the lessee that this lease shall also include, and . . . is hereby included. . . , all the land owned and claimed by the lessor adjacent or contiguous to the land above described, whether in the same or different surveys. . . ." The majority opinion completely disregarded this clause.

occupied by the railroad.[2] *Texas Co. v. Newton Naval Stores Co.*, 78 So.2d 751 (Miss. 1955).

Oil and gas, though remaining in place, are susceptible of distinct and separate ownership from the title of the land.[3] Since Mississippi follows the rule that an oil, gas, and mineral lease conveys an estate in lands, a determinable fee to the underlying minerals,[4] the law of real property forms a natural foundation for the construction of oil and gas leases. In interpreting an instrument of conveyance, the cardinal rule of construction is the intent of the parties;[5] but when the language of a deed or lease is unambiguous, the object is to ascertain the intention of the grantor as expressed by the language used, and not the unexpressed purpose which may at the time have existed in his mind.[6] In order to except certain property from a conveyance, which without the exception would convey all the land, the words of exception must be as definite as those required to convey title; and if they are not so definite, the entire property passes.[7]

Courts generally hold that an instrument of conveyance[8] which excepts from such conveyance a right-of-way, consisting of a mere easement across the land conveyed, conveys the fee to the entire tract, and the exception only operates to render the conveyance subject to the easement.[9] The court, in the noted case, rightfully concluded that the language in the lease was clear and definite enough to exclude something, but the problem here involved was to determine whether the fee title to the land and minerals under the right-of-way was excluded, or whether merely an easement was excluded. In holding that the fee title was excluded, the court gave a great deal of weight to the abandonment of the right-of-way by the railroad company. The case was decided on this point, a distinction being drawn to the effect that when an *abandoned* right-of-way, as distinguished from one in use, is excepted from a conveyance, the fee title and not merely an easement is excepted.[10]

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[2]The dissenting opinion, written by Justice Gillespie, maintained that the "Mother Hubbard" clause should be given some construction in this case even though courts have not generally looked with much favor on such wording in leases. It was also urged in the dissent that "the plain words of the exception mean that appellee [lessee] excepted not the lands under the right-of-way, nor anything other than the right-of-way that the railroad held. If the railroad had no right-of-way, nothing was excepted. If the railroad had a right-of-way, its easement was excepted."

[3]Gulf Refining Co. v. Stanford, 202 Miss. 602, 30 So.2d 516 (1947); Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 17 So.2d 196 (1944); Pace v. State, 191 Miss. 780, 4 So.2d 270 (1941); Liverpool & London & Globe Ins. Co. v. Delaney, 190 Miss. 404, 200 So. 440 (1941); Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739 (1927); Moss v. Jordan, 129 Miss. 593, 92 So. 689 (1922).

[4]Hudson v. Newell, 172 F.2d 848 (5th Cir. 1949); Dougherty v. Greene, 218 Miss. 250, 67 So.2d 297 (1953); Koeing v. Calicote, 199 Miss. 435, 25 So.2d 763 (1946); Lloyd's Estate v. Mullen Tractor & Equip. Co., 192 Miss. 66, 4 So.2d 282 (1941); Stokely v. State *ex rel.* Knox, 149 Miss. 435, 115 So. 563 (1928).

[5]Allen v. Boykin, 199 Miss. 417, 21 So.2d 748 (1946); Gulf & S.I.R.R. v. Patten, 180 Miss. 756, 178 So. 468 (1938); Dunn v. Stratton, 160 Miss. 1, 133 So. 140 (1931).

[6]Stuart v. McCoy, 163 Miss. 551, 141 So. 899 (1932).

[7]Ates v. Ates, 189 Miss. 226, 196 So. 243 (1940); Beasley v. Beasley, 177 Miss. 522, 171 So. 680 (1937); Nunnery v. Ford, 92 Miss. 263, 45 So. 722 (1908); McAllister v. Honea, 71 Miss. 256, 14 So. 264 (1894); Richardson v. Marqueze, 59 Miss. 80 (1881).

[8]It is to be noted that in Mississippi an oil and gas lease is an instrument of conveyance. Cases cited note 4 *supra*.

[9]Kansas City Southern Ry. v. Marietta Oil Corp., 102 F.2d 603 (5th Cir. 1939); Shell Petroleum Corp. v. Ward, 100 F.2d 778 (5th Cir. 1939); Rock Island, A. & L.R. R. v. Guillory, 205 La. 154, 17 So.2d 17 (1944); Jennings v. Amerada Petroleum Corp., 179 Okla. 561, 66 P.2d 1069 (1937); Lewis v. East Texas Finance Co., 136 Tex. 149, 146 S.W.2d 977 (1941); Bolton v. Dyck Oil Co., 114 S.W.2d 299 (Tex. Civ. App. 1938); Penn v. Holland, 105 S.W.2d 351 (Tex. Civ. App. 1937).

[10]The court cited no authority where this distinction had ever been used.

It appears that the court could have reached the same result without using the above mentioned distinction. The rule of strongly construing oil and gas leases against the lessee[11] was not mentioned. The court could have easily cited this rule, added more emphasis to the intention of the parties, and reached the same result with sound authority.

Malcolm T. Yawn

REAL PROPERTY—ADVERSE POSSESSION OF COTENANT

A cotenant in possession, holding for and on behalf of numerous cotenants, most of whom lived outside the state of Mississippi, gave a deed of trust covering the entire tract of land in question. This was given to secure a personal indebtedness, and was not given with the knowledge or consent of the other cotenants. Appellee corporation, holder of the deed of trust, purchased the land at a void foreclosure sale.[1] The deed of sale was duly recorded by the corporation. The question now is whether the record of the deed was sufficient notice to constitute an ouster of the cotenants out of possession and thereby start the running of the statute of limitations in favor of the appellee corporation. HELD: The record of the deed in itself was not sufficient notice to cotenants out of possession, and hence, they did not lose their interest in the land by adverse possession of the cotenant. *Nichols v. Gaddis and McLaurin, Inc.*, 75 So.2d 625 (Miss. 1954).

The general rule seems to be well settled that where one of several cotenants conveys the joint estate by an instrument purporting to vest the fee to the entire property in the grantee, and the latter enters, asserting open and exclusive ownership thereof, the cotenant not conveying is deemed to be ousted, and on the termination of the statutory period, title by adverse possession becomes vested in the grantee.[2] In the case at bar, however, there was no entrance by the grantee. There was no change in possession of the land in question. The appellee corporation, immediately after purchase and without entering upon the land, rented to the cotenant in possession. The only act on behalf of the corporation that could be interpreted as notice was the recording of the deed.[3] The courts in the majority of states have decided that this alone is not sufficient to constitute notice to the cotenants.[4] In holding that the mere

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[11]See 24 AM. JUR., *Gas and Oil* § 44 (1939); 58 C.J.S., *Mines and Minerals* § 197 (1948).

[1]The deed of trust authorized the appointment of a substitute trustee by the original beneficiary. Appellee corporation, after acquiring the deed, appointed a substitute trustee and bought the land at the foreclosure sale. The court held that the appellee did not have the authority to appoint a substitute trustee, and that the foreclosure sale was therefore void. The question raised here, however, is whether the recording of the deed was notice to the cotenants. The fact that the court subsequently declared the sale void does not affect the subject matter of this Casenote.

[2]Clymer v. Dawkins, 44 U.S. (3 How.) 674 (1845); Patterson v. Miller, 154 Ark. 124, 241 S.W. 875 (1922); Gardner v. Hinton, 86 Miss. 604, 38 So. 779 (1905); Saucer v. Kremer, 297 Mo. 461, 249 S.W. 640 (1923). See Annot., 71 A.L.R. 444 (1931).

[3]"And, accepting the view which is usually approved, that the purpose of the recording acts is merely to afford protection to subsequent purchasers, the record of such a conveyance to one cotenant is not sufficient to charge the other with notice." 4 TIFFANY, REAL PROPERTY § 1185 (3d ed. 1939). Also see Arrington v. McDaniel, 14 S.W.2d 1009 (Tex. Comm. App. 1929).

[4]"The cotenant out of possession is not charged with notice that the possession of the other is adverse to him, so that the statute will run in favor of such other, by the mere fact that the other has taken from a third person a conveyance which purports to transfer the whole property." 4 TIFFANY, REAL PROPERTY § 1185 (3d ed. 1939). In Hulvey v. Hulvey, 92 Va. 183, 23 S.E. 233 (1895), the court said: "No one is re-

recording of the deed did not constitute knowledge to cotenants within the meaning of the statute,[5] the court expressly overruled *Peeples v. Boykin*.[6] It seems appropriate that the court took this opportunity to overrule a case so often criticized[7] and so clearly against the weight of authority.[8] The court said: "We do not think that the mere recording alone of a fee simple deed by a cotenant 'imparts notice' to other cotenants of an adverse claim to land by the grantee-cotenant, and do not think that 'this is as effectual for setting the statute in motion as actual notice would have been,' as was held in *Peeples*."[9]

The possession here, notwithstanding the deed and recordation, remained in the eyes of the law a friendly one. The court has now made it clear that ousting a cotenant requires a repudiation of the rights of other cotenants actually brought to their notice by clear and convincing evidence.[10] Henceforth in Mississippi, it will take something more than the mere recording of a deed, whether by a cotenant or by a stranger, to amount to an ouster of the other cotenants.

Harvey S. Buck

REAL PROPERTY—DETERMINABLE FEE OR POWER OF APPOINTMENT?

The petitioners were four of nine children who each owned an undivided one-ninth interest in a tract of land. In 1943, seven of the children conveyed their interests in the land to the two remaining children, respondents, with mineral reservations inserted which reserved to each of the grantors an undivided one-ninth interest in all minerals and mineral rights. "This reservation, however, [is] to remain as an interest in said land only so long as the said land is owned and remains in the possession of the parties of the second part, grantees herein. If any sale of said real estate be made and when made by the parties of the second part, grantees herein, or either of them, or their heirs at law, the said deed shall convey all minerals and mineral rights in and to the said above described land." In 1950, the grantees conveyed the land to a

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quired to watch the clerk's office to see that those in possession of property in privity with him or in subordination to his title are not acquiring rights adverse to him."

[5]"A tenant in common out of possession is entitled to assume that a cotenant in possession holds for all cotenants, until the tenant out of possession is given knowledge to the contrary, or the equivalent thereof, which must be shown by clear and convincing evidence." MISS. CODE ANN. § 711 (1942).

[6]132 Miss. 359, 96 So. 197 (1933). Two of the three children of a mother's second marriage conveyed by warranty deed to the third child all their interest in land which was in the possession of the grantee, the deed reciting that such persons were the only heirs at law of their mother and that the intention was to convey the two-thirds undivided interest. It was held that the record of such deed taken together with the grantee's possession thereunder for a sufficient length of time resulted in complete title as against a child of the mother's first marriage who for a long time remained unaware that the mother had owned the land.

[7]In McDonald v. Roberson, 204 Miss. 737, 38 So.2d 189 (1948), the court pointed out that "the soundness of the opinion in Peeples v. Boykin has been frequently questioned, and we have mentioned it in order to disclose that we do not base our present decision upon it." Also see Hurst v. J. M. Griffin & Son, Inc., 209 Miss. 381, 46 So.2d 440 (1950).

[8]"The general conclusion which seems most consistent with the cases as a whole . . . is that the mere record of a deed purporting to convey the entire property in land to a tenant in possession is not, as a matter of law, notice to cotenants of the adverse character of the grantee's possession. . . ." 1 AM. JUR., *Adverse Possession* § 56.1 (Supp. 1955).

[9]75 So.2d at 633.

[10]The questions of laches and estoppel by deed were raised in a very good dissenting opinion by Justice Lee.

corporation, without reservation of mineral rights. The corporation was joined as a party defendant in the bill, which averred that each complainant still owned a one-ninth interest in the minerals. HELD: The interest in the minerals retained by the grantors was a determinable fee; it terminated upon the conveyance by the grantees to defendant corporation. *Shurley v. Aaron*, 80 So.2d 61 (Miss. 1955).

A determinable fee is that interest which the grantor conveys to the grantee on special limitation, or subject to terminate, with the grantor retaining a possibility of reverter. If an estate is a determinable fee, the happening of the limiting event automatically terminates the fee and it reverts to the grantor or his successors without any act on the part of any of them.[1] In the instant case the petitioners did not convey their interest in the minerals to the grantees on special limitation, but retained title in themselves; therefore, the grantors' mineral interest was not a determinable fee. "Though language be used which would ordinarily create a determinable fee if it referred to an interest in any person other than the grantor, where it refers to an interest reserved to the grantor, it cannot be a determinable fee, and there can be no possibility of reverter in the grantee."[2] These deeds gave the grantees power to terminate the interest which the grantors retained in the minerals by a conveyance to a third party. This power, it is submitted, was a power of appointment,[3] because the power to convey, and thereby terminate, the grantors' interest did not arise from the grantees' ownership but from the authority granted in the original deeds; it was a special power,[4] for it could only be exercised in favor of someone other than the grantees. The writer concludes that the grantees took a fee simple in the surface and the grantors retained a fee simple in the minerals subject to the power of appointment.

If exercise of a power of appointment need not be postponed to a future time, the power may correctly be denominated a present interest.[5] But the estate which the holder of the power may create is contingent upon exercise of the power, and if the power may be exercised after the time fixed by the rule against perpetuities,[6] the power, if a special one, is void.[7] This principle has been generally accepted.[8] In the instant case, since the special power of appointment could be exercised by the grantees, or either of them, *or their heirs at law*, it was possible that it would not be exercised within the time allowed by the rule against perpetuities. Hence, the power was void. If a provision of a deed is void under the rule against perpetuities. other provisions take effect as if the void provision had been struck out.[9] Here, the

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[1]Reichard v. Chicago, B. & Q. Ry., 231 Iowa 563, 1 N.W.2d 721 (1942).

[2]1 SIMES, LAW OF FUTURE INTERESTS § 179 (1936).

[3]"A power over land may be defined as a right or ability in a person to create an estate or interest in land, or to impose a lien thereon, which, when exercised takes effect in diminution or to the destruction of the rights of others in the land, or if it takes effect in diminution or to the destruction of an estate belonging to the person exercising the power, does so by reason of the power alone, without reference to his ownership of the estate." 3 TIFFANY, REAL PROPERTY § 672 (3d ed. 1939).

[4]"A special power of appointment is one which the donee may not exercise in favor of himself or of his estate." 4 AMERICAN LAW OF PROPERTY § 23.60 (1952).

[5]RESTATEMENT, PROPERTY § 153, comment *b* (1936).

[6]"Any person may make a conveyance or a devise of lands to a succession of donees then living, and upon the death of the last of said successors to any person or any heir." MISS. CODE ANN. § 838 (1942).

[7]"If a power of appointment, by the terms of its creation, may possibly be exercised after the time fixed by the rule against perpetuities, the power is bad." 3 TIFFANY, REAL PROPERTY § 712 (3d ed. 1939).

[8]Eager v. McCoy, 143 Tenn. 693, 228 S.W. 709 (1921); GRAY, THE RULE AGAINST PERPETUITIES §§ 473, 487 (4th ed. 1942); 2 SIMES, LAW OF FUTURE INTERESTS § 535 (1936).

[9]Landram v. Jordan, 203 U.S. 56 (1906); Scott v. Turner, 137 Miss. 636, 102 So. 467 (1925); Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922); Henry v. Henderson, 101 Miss. 751, 58 So. 354 (1912); SIMES, LAW OF FUTURE INTERESTS § 529 (1936).

grantors retained a fee simple in the minerals subject to the power of appointment. The elimination of the power because of possible remoteness in its exercise leaves the grantors with a fee simple absolute in the minerals. It follows that the conveyance by the grantees to the corporation should have had no effect upon the estate of the grantors.

The court erred in classifying the grantors' interest as a determinable fee. Had the court classified the grantors' interest as a fee simple subject to a power of appointment, it is submitted that the power would have been declared void under the rule against perpetuities, and the court would have recognized that title to the minerals remained in the grantors.

Edward L. Atkinson

TORTS—IMMUNITY FROM CIVIL LIABILITY FOR MALICIOUS PROSECUTION

Plaintiff, an attorney, instituted this action of malicious prosecution, alleging that a complaint filed by defendant with a county ethics and grievance committee charging him with unethical and unprofessional conduct was malicious and without probable cause, and that his professional reputation suffered thereby.[1] HELD:[2] Public interest requires that persons aggrieved by an attorney's unethical conduct be encouraged to assist the court in fulfilling its constitutional duty to discipline members of the bar. Fear of subjection to civil suit would deter them. Therefore, the filing of such complaint is absolutely privileged. *Toft v. Ketchum*, 113 A.2d 671 (N.J. 1955).

Recent years have seen a steady expansion of civil immunity to various public officials alleged to have maliciously instituted judicial proceedings[3] without probable cause. This extension to one not an official provides an appropriate occasion for a review of this trend. The doctrine of judicial immunity has long protected judges of courts of general jurisdiction from any civil liability for their judicial acts, even when such acts are in excess of their jurisdiction,[4] and are malicious and corrupt.[5] Inferior judges, including justices of the peace, have been accorded a like immunity, as to judicial acts within their jurisdiction.[6] Modern decisions tend to abolish any distinction between the immunity accorded judges of general and limited jurisdiction.[7] Modern authority is substantially uniform in holding prosecuting officers immune from civil liability for malicious prosecution when the acts alleged to have been mali-

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[1]The disciplinary proceeding had terminated in favor of plaintiff on grounds other than the merits. This appeal was from a judgment dismissing the complaint for failure to state a cause of action.

[2]Two justices dissented, and one justice concurred on other grounds.

[3]The court held that the filing of a complaint with an ethics and grievance committee is, in effect, a filing with the supreme court, and hence, judicial in nature. For extension of the action to remedy prior administrative proceedings adjudicatory in nature, see Melvin v. Pence, 130 F.2d 423 (D.C. Cir. 1942); Rivers v. Dixie Broadcasting Corp., 88 Ga. App. 131, 76 S.E.2d 229 (1953); RESTATEMENT, TORTS § 680 (1938).

[4]But civil liability is imposed when such judicial acts are in clear absence of all jurisdiction over the subject matter. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).

[5]Bradley v. Fisher, *supra* note 4; Broom v. Douglass, 175 Ala. 268, 57 So. 860 (1912); Webb v. Fisher, 109 Tenn. 701, 72 S.W. 110 (1903).

[6]Ravenscroft v. Casey, 139 F.2d 776 (2d Cir. 1944), *cert. denied*, 323 U.S. 745 (1944); Curnow v. Kessler, 110 Mich. 10, 67 N.W. 982 (1896); Yelton v. Becker, 248 S.W.2d 86 (Mo. App. 1952); Grant v. Williams, 54 Mont. 246, 169 Pac. 286 (1917).

[7]Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947); Linder v. Foster, 209 Minn. 43, 295 N.W. 299 (1940).

cious and without probable cause were discretionary and within the scope of duty.[8] With less unanimity of judicial opinion, various other law enforcement officers have been held immune: sheriffs,[9] police,[10] FBI agents,[11] fire marshals,[12] fire and building inspectors,[13] fish and game investigators.[14]

Immunity has been further extended to a government corporation,[15] and to various executive and administrative officers exercising discretion in the performance of their duties: Postmaster General,[16] Comptroller of Currency,[17] Secretary of Treasury and assistant,[18] parole board,[19] building and loan commissioner,[20] mayor.[21] Thus has the immunity which began as an essential to an independent judiciary been extended. A study of the reported decisions justifies the conclusion that, in the majority view, it now extends to any law enforcement officer required to exercise discretion in the performance of his duties, and to many executive and administrative officers performing discretionary duties.[22] Each decision has stressed the necessity of protecting public officials in the fearless discharge of their duties. Awareness of unrecompensed private injury has been repeatedly expressed, and repeatedly found secondary to the public interest in the unhampered administration of justice.

Dissenters have not been lacking.[23] Many judges have been unable to accept the proposition that civil irresponsibility for malicious acts is necessary to, or even aids, the orderly administration of justice; nor have some understood how a malicious act can be regarded as within the scope of an official's duty. In the instant case, the dissenters pointed out that malicious disciplinary proceedings seriously jeopardize an attorney's reputation. And further, in view of the fact that proof of malice and want of probable cause is a difficult task, denial of immunity should not discourage those with legitimate grievances, or endanger them if honestly mistaken.

Immunity, to one, is denial of a substantive right to another, justifiable only by

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[8]Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927); Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896); Smith v. Parman, 101 Kan. 115, 165 Pac. 663 (1917); Semmes v. Collins, 120 Miss. 265, 82 So. 145 (1919); Watts v. Gerking, 111 Ore. 641, 228 Pac. 135 (1924); RESTATEMENT, TORTS § 656 (1938). *Contra*, Leong Yau v. Carden, 23 Hawaii 362 (1916).

[9]Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876 (1952), *cert. denied*, 344 U.S. 840 (1952). *Contra*, Moser v. Fulk, 237 N.C. 302, 74 S.E.2d 729 (1953).

[10]Laughlin v. Garnett, 138 F.2d 931 (D.C. Cir. 1943), *cert. denied*, 322 U.S. 738 (1943). *Contra*, Motley v. Dugan, 191 S.W.2d 979 (Mo. App. 1945) (township constable and deputy).

[11]Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938); 12 So. CALIF. L. REV. 216 (1939).

[12]Phelps v. Dawson, 97 F.2d 339 (8th Cir. 1938).

[13]Springfield v. Carter, 175 F.2d 914 (8th Cir. 1949); White v. Brinkman, 23 Cal. App. 2d 307, 73 P.2d 254 (1937); Note, 23 TEMP. L.Q. 246 (1950).

[14]White v. Towers, 37 Cal. 2d 727, 235 P.2d 209 (1951).

[15]Adams v. Home Owners' Loan Corp., 107 F.2d 139 (8th Cir. 1939), 53 HARV. L. REV. 686 (1940).

[16]Spalding v. Vilas, 161 U.S. 483 (1896).

[17]Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938).

[18]Standard Nut Margarine Co. v. Mellon, 72 F.2d 557 (D.C. Cir. 1934), *cert. denied*, 293 U.S. 605 (1934).

[19]Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1937), *cert. denied*, 302 U.S. 686 (1937).

[20]Jones v. Richardson, 9 Cal. App. 2d 657, 50 P.2d 810 (1935).

[21]Burgin v. Sullivan, 151 Ala. 416, 44 So. 202 (1907).

[22]For a particularly broad view of its scope, see White v. Towers, 37 Cal. 2d 727, 235 P.2d 209 (1951).

[23]Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); White v. Towers, *supra* note 22; Watts v. Gerking, 111 Ore. 641, 228 Pac. 135 (1924); Leong Yau v. Carden, 23 Hawaii 362 (1916).

clear public necessity. If policy demands immunity for this defendant, it would seem to require little further extension to cloak one maliciously charging another with criminal conduct. For, surely, a court's constitutional duty to discipline attorneys is not more imperative than its duty to punish criminals.

William D. Adams

RECENT BOOKS

HANDBOOK OF OIL AND GAS LAW. By Robert E. Sullivan. New York: Prentice-Hall, Inc., 1955. Pp. 556. $11.35.

Oil and gas as a separate field of law has grown tremendously in a relatively few years; concurrently with the growth of the industry there has been an avalanche of published legal material devoted to this area and its several specialized parts. Not only does the practitioner of this cabalic art have available to him Summers on *Oil and Gas* and the *American Law of Property* which are ideally suited for, and afford a complete coverage of the subject but, in addition thereto, the Southwestern Legal Foundation publishes the *Oil and Gas Reporter*—a complete reporter of all oil and gas cases—embellished with multitudinous discussion notes and citations to assist the busy practitioner in his brief writing labors. I have mentioned a few of the books in the field to illustrate that there is a quantity of technical oil and gas material available. As an instructor in oil and gas law I have been interested in materials which would enable the law student to acquire a reasonable amount of textual information concurrently with the coverage of the great quantity of case material which must be taken in the course. Necessarily this has meant the citing of numerous texts, reporters, law journal articles and other special materials which the student must read. The book which Professor Sullivan has written appeals to me as substantially suited for this purpose; no single book could, of course, operate as a complete substitute for the reading which must be done.

The author has designed the book not only for lawyers, but for people in the oil industry who are not lawyers, with the announced purpose of restating the basic principles of oil and gas law, the reasons therefor, and their application in the light of present day operation. It is devoted to the production and transportation phases of the oil industry—those areas dealing with refining and marketing are not treated. Taxation and certain aspects of financing, peculiar to the oil and gas industry, are also taken into consideration.

The subject is subdivided into seven major parts, and each part is again subdivided by chapters, containing material relevant to the particular major topics. The sequence of topics is well arranged, beginning with a factual narration of the nature of the substance and the landowner's interest. It is, of course, necessary that one understand the factual basis upon which the law of oil and gas is based before any true appreciation for the legal development of the subject can be acquired. In this connection the chapter on the origin, occurrence, and production of petroleum is well done. Professor Sullivan has treated here the major technical aspects of the mineral, without becoming unnecessarily detailed in his exposition of the technical side of the industry. The geology, origin, search, reservoirs, properties, production, secondary recovery, and conservation of petroleum are considered, in that order, in Part I. The material is simply and concisely set down with enough technical treatment of the subject, accentuated by concrete examples of the problem discussed, to enable anyone interested in the field to grasp immediately the problems involved. Part I is concluded by a chapter dealing with the nature of the landowner's interest. Fundamental theory in the law of oil and gas is encountered here; ownership of oil and gas in place, rule of capture, severance of the mineral estate, adverse possession, partition and correlative rights are considered herein. The topics are all adequately considered and, for the student, each point made is footnoted sufficiently to lead him to relevant cases and law review articles on the subject, if he desires to pursue it further.

One of the most fertile areas in oil and gas litigation is the lease; nine chapters,

under the general heading of "The Oil and Gas Lease," including their creation, interpretation, and termination, are devoted exclusively to this area. This topic does not lend itself very nicely to generalized discussion—detailed treatment is dictated by the variety of lease clauses and by the great number of cases in which the principal source of contention is the lease. A typical chapter, entitled "Drilling and Delay Rental Clause" subsumes for discussion the individual problems of the "or" and the "unless" clauses, bonus payments, commencing a well, dry holes, delay rentals, depositories, the proportionate reduction clause, dry hole clauses, express drilling clauses, and remedies for breach. Other chapters in this section deal with formalities incident to the execution of an oil and gas lease: the granting clause, the habendum clause, the royalty clause, the pooling clause, implied covenants and termination. One chapter is occupied with a series of miscellaneous clauses that defy classification, such as drilling restrictions near buildings, damage to growing crops, Mother Hubbard Clause, use of oil and water, right to remove fixtures, assignments, warranty, subrogation and force majeure clauses. Perhaps the chapter on the implied covenant was not as fully covered as it should have been; the implied covenant has been the source of a great deal of litigation. The speculative nature of the industry is well known, and frequently lessees are required to enter into unusual relationships or to pursue courses of conduct which they would not have done had alternatives presented themselves. In this connection some rather unusual results are reached by courts under the theory of breach of implied covenant—thus adding another hazard to the business. Quite apparently the lessee will not know the outcome of some of his business transactions, even though he attempts to hedge against untoward results by express covenant while the quagmire of implied covenant is present.

"Permissible Transfers of Interest by the Landowner and His Lessee" is the title of Part III. There are two chapters in this part, one dealing with assignments by the landowner, and the other, assignments of the lessee. The nature and elements of assignment, mineral deeds, rights of the mineral grantee, fractional conveyances, description, term mineral deeds, royalty, royalty deeds, and other variations of this type relationship are included.

Conservation and governmental regulation of production represents a major topic. The mechanics of regulation of the petroleum industry, including a history of conservation legislation and the sources of authority to regulate production, coupled with the very important administration of conservation legislation, are developed in three chapters. Judicial review, enforcement, and supervision are developed in a separate chapter. Within the general area of administrative law the several oil and gas boards and commissions have made steady inroads on the domain of the producer in the form of regulation, supervision, and control, until today there is more governmental control in the oil and gas field than ever before.

The transportation problems of the petroleum industry are covered in two chapters. Pipeline transportation, mechanics of purchase and delivery, regulation of rates and services, gas purchase contracts, and regulation of service and operations are among the subjects included under this main heading.

Parts VI and VII deal with taxation and problems incident to the commencement and the financing of the oil operation. They seem to have been added as an afterthought. Both topics have received such sketchy treatment that Professor Sullivan would have done well in omitting them. In fairness to the author, he indicates that he intended to deal with production and transportation only, and with the aspects of taxation and financing that are peculiar to those branches of the industry. Federal law dealing with the taxation of oil and gas income is extensive, and of great importance, and therefore should either have been dealt with in full or omitted entirely.

I like Professor Sullivan's book, and, with the exceptions noted, it has balance, fullness, and scholarly coverage. The style employed is typically legalistic; the book abounds in lawyer's jargon. There are copious footnotes, including citations to cases and legal periodicals relevant to the point under discussion.

Arthur B. Custy
Professor of Law
University of Mississippi

MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE. By William B. Aycock and Seymour Wurfel. Chapel Hill: University of North Carolina Press, 1955. Pp. 430. $7.50.

A book is a work of art if it reflects knowledge and understanding by the author or authors of the subject matter. In considering this latest treatise on a subject that is as old as the earliest of the organized armies, the first thought turns to those who prepared the manuscript. The introduction indicates at least that they are well thought of as to ability and performance by one who is in the best position to judge, the Judge Advocate General of the United States Army. With this as a beginning it will be merely "sending coal to Newcastle" to add that the writer's personal acquaintance with the authors permits him to say that their knowledge and understanding came not alone from intensive study, but also from the fields where the hard lessons of experience sometimes deal bitter blows, but always leave positive marks that thereafter pronounce their victims the possessors of humble greatness in their avocation.

Although the writers, in the beginning, announce a limitation on the scope of the text to a mere collection of the more important pronouncements of the United States Court of Military Appeals, which they point out has actually rendered decisions only thirty-one months to the time of the publication, the book is, in effect, a carefully edited compilation of law journal articles that have been revised, extended, and so chronologically arranged that it would appear to have been planned thus initially. Obviously a code of law which attempts to unify process and procedure in branches of the service that have from time immemorial had so varied customs that it would appear to be almost impossible to reconcile them, needs an authoritative interpretation. When the Court of Military Appeals was organized it was known that within a comparatively short space of time there would be many decisions on the complex problems that would arise in the administration of such a monumental revision of the law affecting the land and naval forces. To collate these opinions into a usable text was also a monumental undertaking. This appears to have been the goal of the writers in preparing this book. They did not fall short, but have added a new landmark in reference materials.

While this text was written primarily for the military lawyer and those civilians who practice in military courts, those who are not versed in military law will have their interest aroused by the historical discussion of the English and European background of our own rules governing the dispensation of justice in our several armed forces. From this they will better understand the reasons why military tribunals and laws are separate and distinct from civilian courts and civilian laws, and also why there is a great difference in the two procedures.

The text is arranged in order of legal thinking. It begins properly at the begin-

ning with the several phases of jurisdiction, the military court, the person, the offense, and the sentence. As to the last named subject, one would not ordinarily think of a court-martial sentence as having jurisdictional features. The explanation is understandably set forth in the discussion of the permissible punishments which, literally interpreted, the Articles of War provided for, and the limitations under the Table of Maximum Punishments, administratively prescribed by the Commander in Chief, by which a court-martial is bound.

Jurisdictional questions are shown to have become of great import in military law since World War II and since the changes that were brought about in military justice immediately after World War II on the basis of a consensus of both military and lay opinion. These changes have been brought forward and incorporated into the Uniform Code. The provisions of law as contained in this code are more favorable to the accused but their interpretation has kept abreast of the times. Thus the "land and naval forces" specified in the Constitution contemplates all types of armed services, including the air force.

In their treatment of the law officer the authors rightly give him the status that is intended by the code, that of being a judge of a military court. They point out that within his new position come many of the same responsibilities of a civilian judge. For example, his instructions to the court are subject to the same possibility of error. One of the cases cited shows one of the typical differences between civilian and military courts. It is error, though perhaps not prejudicial error, to fail to instruct the court on all of the elements of the offense, even when the accused pleads guilty. Another difference shown is that on appeal this failure is automatically noticed without the necessity of defense counsel raising the point in the court below.

The discussion of trial procedure reflects the thorough military background of the writers. It also lends to the young trial attorney an insight into the necessary meticulousness of a successful advocate.

Generally the appellate procedure is shown to be not unlike that of civilian courts. The record must be made in the court below, but the military appellate review boards and the court have a wider scope of review than the ordinary civilian court. Now, with the addition of the Court of Military Appeals, there is a final and an actual civil court which reviews mandatorily certain type cases, and may review upon petition and good cause shown all cases which are reviewed by a board of review. Under the broad authority of the Court of Military Appeals almost any case, except one which a civilian might call a petty misdemeanor, could eventually find its way into that court. But even the minor cases where an important question of military law is concerned might also reach that tribunal.

The text discussion fails to show the advanced thinking of the armed services in providing a public defender system even in the highest military appellate court. This is a minor detail which is set forth in the code itself, but is mentioned here because the average practitioner is not familiar with military appellate procedure. Competent appellate counsel furnished without cost to a convicted member of the armed services certainly helps insure fairer trials in the courts of first instance, and also a more correct interpretation of the law by the appellate courts.

As heretofore stated, the remainder of the text follows a planned sequence of legal thinking and then concludes with a phase particularly developed by Colonel Wurfel which deals with military habeas corpus. An examination of this final chapter will be beneficial to any practitioner whether or not he ever has occasion to practice in military courts, because of the detail with which it develops the constitutional background and the purposes of a writ of habeas corpus.

That part of the chapter dealing with military habeas corpus is given real authenticity by the fact that Colonel Wurfel and the present Judge Advocate General were both participants in a large number of habeas corpus proceedings that were tried after World War II in the Third Army Area United States District Courts, and later in the Fifth Circuit Court of Appeals. Major General Caffey, then Colonel Caffey, was Third Army Staff Judge Advocate, and Colonel S. Wurfel was his first assistant. Lieutenant Colonel William V. Aycock, JAGC, U.S. Army Reserve, in civilian life Professor of Law, University of North Carolina, was a close observer of all these proceedings for several short tours as assistant Staff Judge Advocate, Third Army.

The text is concluded with the usual table of cases and an alphabetical index. In addition, it contains a useful reference to citations of the Articles of War and the Uniform Code. Finally, in an appendix there is set out in full the Uniform Code of Military Justice.

The increasing problems of our armed forces personnel with regard to military law, and the probable coming universal military service, by whatever name it may be called, of all qualified males, give this work its highest importance in the field of the law student and the military practitioner. However, as pure jurisprudence, it is unqualifiedly recommended as a necessary and useful addition to the library of all members of the legal profession.

Lunsford Casey
Circuit Judge
Laurel, Misissippi

BOOKS RECEIVED

CASES AND STATUTES ON THE ADMINISTRATION OF CRIMINAL LAW. By Edwin R. Keedy and Robert E. Knowlton. Indianapolis, Indiana: Bobbs-Merrill Company, Incorporated, 1955. Pp. 536. $7.50.

CASES ON DECEDENTS' ESTATES. (2d Ed.) By Max Rheinstein. Indianapolis, Indiana: Bobbs-Merrill Company, Incorporated, 1955. Pp. 875. $10.00.

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DIRECTORY OF AMERICAN JUDGES. By Charles Liebman. Chicago: American Directories, 1955. $20.00.

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IT'S YOUR LAW. By Charles P. Curtis. Cambridge, Massachusetts: Harvard University Press, 1955. Pp. 178. $3.75.

PRISON, PROBATION, OR PAROLE? By Paul W. Keve. Minneapolis: University of Minnesota Press, 1954. Pp. 263. $3.75.

SUPREME COURT PRACTICE. By Robert L. Stern and Eugene Gressman. Washington, D.C.: The Bureau of National Affairs, Incorporated, 1954. Pp. 585. $10.50.

TRIAL BY ORDEAL. By Caryl Chessman. New York: Prentice-Hall Incorporated, 1955. Pp. 309. $3.95.

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